

TABLE OF CONTENTS

	PAGE
Docket Entries	1a
Complaint (Doc. No. 1, Record on Appeal)	9a
Notice of Motion for Leave to Intervene (Doc. No. 7, Record on Appeal)	17a
Order Granting Leave to Intervene (Doc. No. 9, Rec- ord on Appeal)	35a
Answer of Defendants Levitt and Nyquist (Doc. No. 12, Record on Appeal)	37a
Intervenor-Defendants' Interrogatories to Plaintiffs (Doc. No. 17, Record on Appeal)	43a
Plaintiffs' Interrogatories to Intervenor-Defendants (Doc. No. 18, Record on Appeal)	48a
Plaintiffs' Interrogatories to Defendants (Doc. No. 19, Record on Appeal)	51a
Plaintiffs' Answers to Intervenor-Defendants' Inter- rogatories (Doc. No. 20, Record on Appeal)	56a
Intervenor-Defendants' Answers to Plaintiffs' Inter- rogatories (Doc. No. 21, Record on Appeal)	61a
Defendant Nyquist's Answers to Plaintiffs' Interroga- tories (Doc. No. 24, Record on Appeal)	85a

Stipulation re Answers to Interrogatories (Doc. No. 29, Record on Appeal)	91a
Opinions of Lasker, J. and Palmieri, J. dated April 27, 1972 (Doc. No. 30, Record on Appeal)	93a
Order and Judgment dated June 1, 1972 (Doc. No. 32, Record on Appeal)	94a
Order to Show Cause and Affidavit in Support of Application for Leave to Intervene (Doc. No. 36, Record on Appeal)	95a
Order Granting Leave to Intervene (Doc. No. 39, Record on Appeal)	113a
Answer of Intervenor-Defendant Brydges (Doc. No. 43, Record on Appeal)	115a
Order dated Nov. 6, 1972 Noting Probable Jurisdiction and Consolidating Appeals	120a

Docket Entries

CIVIL DOCKET

UNITED STATES DISTRICT COURT

70 Civ. 3251

DATE	PROCEEDINGS
Jul 30-70	Filed complaint issued summons
Sept. 16-70	Filed summons with marshal's ret. Served: Nelson A. Rockefeller by Lewis Stone, Counsel on 8/3/70 (Northern Dist. N.Y.) Arthur Levitt by Alfred W. Haight, Jr. on 8/3/70. (Northern Dist. N.Y.) Ewald B. Nyquist by Joseph Gibbons, Counsel on 8/3/70 (Northern Dist. N.Y.)
Oct. 20-70	Filed Notice of Motion re: Dismiss complaint. Ret. 11/10/70
Oct. 20-70	Filed Memorandum of Law in opposition to convening 3-judge court.
Oct. 30-70	Filed Notice of Motion re: convene a 3-judge court RET. 11/10/70.
Oct. 30-70	Filed Memorandum of Law in support of 3-judge court and in opposition to motion to dismiss.
Nov. 2, 70	Filed notice of motion for leave to intervene. Ret. 11-10-70
Nov. 2, 70	Filed memorandum in support of motion to intervene as defts.
Nov. 10-70	Filed (in court) Order that Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam have leave to intervene, etc., Lasker, J.

Docket Entries

DATE	PROCEEDINGS
Nov. 10, 70	Filed MEMO. END. on motion filed 11-2-70 Motion disposed of in accordance with consent order submitted and signed this date. So Ordered Lasker, J.
Nov. 12-70	Filed ANSWER of intervenor-Defendants to complaint.
Jan. 28-71	Filed OPINION #37360. Lasker, J. The Plaintiffs' motion to convene a 3-judge court pur. to 28 USC 2281 is granted. Defendants' motions to dismiss are denied, except that the motion to dismiss as to Gov. Rockefeller is granted. Defendants' motion to drop the Committee as a party pltf. is denied. It is so ordered. (mailed notice).
Feb. 11-71	Filed ANSWER of defts. Levitt and Nyquist.
Feb. 11-71	Filed Brief of defts. Levitt and Nyquist.
Feb. 25-71	Filed Designation of Judges for 3-Judge Court. In addition to the Hon. Morris E. Lasker to hear and determine this cause the following judges are designated: Hon. Paul R. Hays, U.S. Circuit Judge, and Hon. Edmund L. Palmieri, Dist. Judge. Lumbard, Ch.J., U.S.C.A.
Mar. 10-71	Filed ORDER that a hearing in this matter shall be held on Thursday, 4/8/71 at 10 AM in Courtroom 110, U.S. Court House; Ordered that parties shall submit memoranda etc. originals to be filed with the Clerk of this Court

Docket Entries

DATE

PROCEEDINGS

on or before 3/29/71 copies thereof to be delivered to each member of the 3-judge court at his chambers. Lasker, J. (mailed notices)

- Mar. 12-71 Filed Statutory Notice of Notice of Hearing before a 3-judge court set for 4/8/71, mailed 3/11/71.
- Jan. 13-72 Filed Intervenor-Deft's interrogs.
- Feb. 4-72 Filed plttfs' interrogs.
- Feb. 4-72 Filed plttf's interrogs to deft's.
- Feb. 14-72 Filed plttf's answers to interrogs.
- Mar. 9-72 Filed Intervenor-defts answers to plttf's interrogs.
- Mar. 10-72 Filed additional interrogs by inta rvenor-deft's to plttf's.
- Mar. 16-72 Filed Order that parties shall submit memoranda, Interrogs, etc on, or before 4-4-72, a hearing shall be held on 4-11-72, at 10:00 A.M. in courtroom 1305 of the US court house, Lasker, J
- Apr. 4-72 Filed deft's (Commissioner of Education) answers to interrogs.
- Apr. 4-72 Filed plttf's brief.
- Apr. 7-72 Filed affidavit of service by Mail by H. W. Brauer of Davis Polk & Wardwell.
- Apr. 11-72 Filed stip that deft's answers to plttf's interrogs & exhibits may be taken as accepted facts for the purposes of this case.

Docket Entries

DATE	PROCEEDINGS
Apr. 11-72	Filed reply brief for Intervenor-deft's Cathedral Academy St. Ambrose, School & B.L. Memorial High School.
Apr. 6-72	Filed Intervenor defts (Cathedral Academy et al) brief
Apr. 27-72	Filed Opinion #38450: A permanent injunction against the enforcement of the statute will be granted. The deft's motions are denied. Submit order on notice, Hays, Circuit Judge & Lasker, J. and Dissenting opinion of Palmieri, J. Mailed notice.
Apr. 27-72	Filed reply brief for Intervenor-deft's.
Apr. 27-72	Filed Brief for Intervenor-deft's
Apr. 27-72	Filed brief for plttf's.
Apr. 27-72	Filed brief for intervenor-deft's Cathedral Academy.
Apr. 27-72	Filed Reply brief for intervenor-deft's Cathedral Academy.
Apr. 11-72	Before Hays, C.J., Palmieri, D.J. & Lasker, J. Statutory Court held and concluded—Decision reserved after oral argument.
May 19-72	Filed Order & Judgment; Ordered that deft's motion to dismiss the complaint is denied. Deft's, their agents & all persons acting for, or on behalf of the State of New York are permanently enjoined from making any payments

Docket Entries

DATE

PROCEEDINGS

or disbursements out of state funds in payment for or reimbursement of any moneys heretofore or hereafter expended by non-public elementary & secondary schools in rendering services, for examination & inspection in connection with administration, etc. Hays, Circuit Judge & Lasker, J. Judgment ent. Clerk. Ent. 5-25-72.

- Jun. 1-72 Filed Order & Judgment: The order & Judgment of the Court filed on the 19th day of May, 1972, is hereby vacated as indicated. Lasker, J. Judgment Ent. Clerk. Mailed notice Ent. 1-2-72.
- Jun. 6-72 Filed Intervenor-deft's affidavit & notice of motion suspending injunction ret. 6-13-72.
- Jun. 6-72 Filed Intervenor-deft's memorandum of law in support of their motion.
- Jun. 14-72 Filed def't's affidavit & notice of motion suspending the injunction, granted in this action, ret. in RM. 905 before Lasker, J.
- Jun. 16-72 Filed Intervenor-Applicant affidavit & order to show cause for leave, to intervene ret. in Rm 905-10: A.M. on 6-20-72. before Lasker, J.
- Jun. 19-72 Filed def't's NOTICE OF APPEAL to the Supreme Court.
- Jun. 28-72 Filed Order that Senator Earl W. Brydges in his representative, capacity as the Majority leader, has leave to intervene in this cause &

Docket Entries

DATE

PROCEEDINGS

is made a party thereto & to that end may file his answer, he is authorized to participate in all prospective proceedings in this cause in the same manner & with like effect as if named an original party in this cause. Hays, J. Palmieri, J. & Lasker, J. m/n

- Jun. 30-72 Filed Order that motions for an order suspending the injunction heretofore entered on June 1, 1972, & the same hereby are denied, Judge Palmieri, dissenting. Hays, U.S.C.J. & Lasker, J.
- Jun 30-72 Filed Notice of Appeal to the Supreme Court of the U.S.A. by the Intervenor Defts. (mailed notice)
- Jun 23-72 Filed transcript of Record of Proceedings before 3-judge court, Hays, C.J., Palmieri, D.J. and Lasker, D.J. on 4/11/72.
- Jul 11-72 Filed Notice of Appeal to the Supreme Court of the U.S. by Bais Yaakov Academy for Girls.
- Jul 14-72 Filed Answer of Intervenor-Defendant Senator Earl W. Brydges.
- Jul 14-72 Filed Notice of Appeal to the Supreme Court of the U.S. by deft. Senator Earl W. Brydges.
- Aug. 8-72 Filed Order authorizing transmission of Record. Ordered that the Clerk of this Court is authorized and directed to transmit to the Clerk of the Supreme Court of the United States all of the original papers filed in the

Docket Entries

DATE

PROCEEDINGS

Office of the Clerk of this Court which are the record on appeal; further ordered that these original papers be kept safely by the Supreme Court of the United States and returned to the Clerk of this Court upon the conclusion of the appeal. Bauman, J. (mailed notice).

- Aug 15-72 Filed transcript of record of proceedings dated June 20, 1972.
- Aug 18-72 Filed Notice that the case has been certified & transmitted to the Supreme Court of the U.S.
- Sep 6-72 Filed one red portfolio containing affdvts Re: Effect of Denial of Mandated Services Act Payments Pending Appeal to U.S. Supreme Court.
- Sep 6-72 Filed Brief for defts Levitt and Nyquist.
- Sep 6-72 Filed Reply Brief for Intervenor-Defts Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School.
- Sep. 6-72 Filed Brief for Intervenor-Defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School.
- Sep. 6-72 Filed stipulation that the answers filed by deft. Nyquist, Commr. of Education and by intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School, to the interrgs. propounded by pltfs. and the exhibits thereto, may be taken as accepted facts for the purposes of this case.

Docket Entries

DATE	PROCEEDINGS
Sep 7-72	Filed one envelope of affidvts Re: hearing of 6-20-72 ordered sealed and filed this date 6-27-72, placed in vault in Rm. 603. LASKER, J.
Sep 8 72	<i>Filed Transcript of record of proceedings, dated 6-20-71</i>
Sep 14, 72	Filed Order. Ordered the Clerk of this Court unseal the 49 affidavits ordered sealed by this Court on 6/27/72 Etc., that the clerk of this court, upon the return of the aforesaid affidavits from the Supreme Court of the U.S., re-seal them until further of this court. Lasker, J.
Sep 14, 72	Certified supplemental record to the US Supreme Court.
Nov. 9-72	Filed order of discontinuance adjudicated on the merits and that final judgment was entered on June 1, 1972. Bauman, J.
Nov. 13-72	Filed true copy of Order of the Supreme Court of the United States. The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument. (Mailed Notice) EA

Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of
New York, and EWALD B. NYQUIST, as Commissioner of
Education of the State of New York,

Defendants.

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the State of New York to finance the operations of schools owned and controlled by religious organizations and organized for and engaged in

Complaint

the practice, propagation and teaching of religion, and to declare such use violative of the First and Fourteenth Amendments to the Federal Constitution and of Article XI, Section 3 of the Constitution of the State of New York.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, United States Code, Sections 1331, 2281, 2283, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars (\$10,000) as more fully appears hereinafter.

4. Plaintiff COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY (PEARL) is an unincorporated association whose constituent members are: American Ethical Union; American Jewish Committee, New York Chapter; American Jewish Congress; Americans for Democratic Action; Americans for Public Schools; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Citizens Union of the City of New York; City Club of New York; Council of Churches of the City of New York, Jewish War Veterans, New York Department; National Council of Jewish Women, New York City; National Women's Conference of American Ethical Union; New York Civil Liberties Union; New York Jewish Labor Committee; New York Metropolitan Region, United Synagogue of America; New York State Council of Churches; New York State Council, Union of American Hebrew Congregations; New York State Federation of Reform Synagogues; Public Education Association; State Congress of Parents and Teachers, New

Complaint

York City District; Unitarian Universalist Ministers Association of Metropolitan New York; United Federation of Teachers; United Parents Associations; Women's City Club of New York and Workmens Circle. The members of these organizations who reside in the State of New York are numerous and the organizational plaintiff and each of its constituent organizations carry on activities in the Southern District of New York. The organizational plaintiff and its constituents share as common objectives preservation of freedom of religion and the separation of church and state and opposition to the use of public funds for the support of sectarian or religious schools.

5. Each of the individual plaintiffs is a citizen of the United States. Each resides in the State of New York, and some reside in the Southern District of New York. Each of them pays income and various other taxes in and to the State of New York. Plaintiffs Theodore Brooks, Herschel Chanin, Naomi Cowan, Blanche Lewis, Aryeh Neier and Albert Shanker have children regularly registered in and attending the elementary or secondary grades in the public schools of New York.

6. Defendant Nelson A. Rockefeller is the Governor of the State of New York and is sued herein in that capacity. Defendant Arthur Levitt is the Comptroller of the State of New York and is sued herein in that capacity. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and is sued herein in that capacity.

Complaint

II. FACTUAL ALLEGATIONS

7. On April 18, 1970 the defendant Nelson A. Rockefeller signed into law Chapter 138 of the Laws of 1970, effective July 1, 1970, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor." (The text of the Act is set forth herein as Appendix A.) The Act apportions the sum of Twenty-eight million (\$28,000,000) of state moneys to be paid by the defendant Arthur Levitt, on certification of the defendant Ewald B. Nyquist, to nonpublic schools in accordance with a formula set forth therein for expenses of services for examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.

8. On information and belief: Each of the defendants herein has construed the aforesaid Act to encompass as beneficiaries schools owned and controlled by religious bodies, organized for and engaged in the practice, propagation and teaching of religion and schools which limit, or give preference in, admission and employment to persons of particular religious faiths and, unless enjoined by this court, will approve the payment of state funds and make such payment to such schools in violation of the Constitution of the United States and the Constitution of the State of New York as hereinafter set forth.

Complaint

9. The First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *."

10. Section 3 of Article XI of the Constitution of the State of New York provides: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

11. It is against the religious conscience of each of the plaintiffs to be forced by the operation of the taxing power into contributing to the propagation of religion or for the support of religious schools.

III. CAUSES OF ACTION

12. *First Count*: Chapter 138 of the Laws of the State of New York of 1970, on its face and as construed by the defendants, is a law respecting an establishment of religion in violation of the First Amendment of the United States Constitution in that it (a) constitutes governmental financing and subsidizing of schools which are controlled by religious bodies, organized for and engaged in the practice,

Complaint

propagation and teaching of religion, and of schools limiting or giving preference in, admission and employment to persons of particular religious faiths; (b) constitutes governmental action whose purpose and primary effect is to advance religion; and (c) gives rise to an excessive governmental involvement in and entanglement with religion.

13. *Second Count*: The statute on its face and as construed by the defendants violates the First Amendment to the United States Constitution in that it prohibits the free exercise of religion on the part of the individual plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious schools.

14. *Third Count*: The statute on its face and as construed by the defendants violates Section 3 of Article XI of the Constitution of the State of New York in that it constitutes the use of public money in aid or maintenance of schools wholly or in part under the control or direction of religious denominations and in which denominational tenets or doctrines are taught.

IV. OTHER ALLEGATIONS

15. This suit involves a genuine case or controversy between the plaintiffs and defendants.

16. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

Complaint

V. PRAYERS FOR RELIEF

17. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare unconstitutional and enjoin the enforcement of Chapter 138 of the Laws of New York of 1970, as hereinbefore set forth.

(2) That the defendants and each of them be enjoined from approving or paying any funds of the State of New York to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such approval or payment is purported to be made pursuant to the aforesaid statute or otherwise.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief sought herein.

(4) That the plaintiff be granted such other and further relief as the Court may deem just and proper.

July 30, 1970

/s/ LEO PFEFFER

LEO PFEFFER

Attorney for the Plaintiffs

Office and P. O. Address

15 East 84th Street

New York, N. Y. 10028

Telephone: (212) 879-4500

[Appendix A to Complaint, Chapter 138
of the 1970 Laws of New York, printed
in full in Appendixes to Jurisdictional
Statements]

Notice of Motion for Leave to Intervene**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[TITLE OMITTED IN PRINTING]

SIRS :

PLEASE TAKE NOTICE that upon the annexed affidavits of Porter R. Chandler, sworn to October 30, 1970, and Marcel Weber, sworn to October 30, 1970, the annexed copy of the proposed Answer of Intervenor-Defendants and upon all prior pleadings and proceedings herein, Cathedral Academy, 75 Park Avenue, Albany, New York 12202, St. Ambrose School, 31 Empire Building, Rochester, New York 14604, Bishop Loughlin Memorial High School, 356 Clermont Avenue, Brooklyn, New York 11238, Bais Yaakov Academy for Girls, 88-01 102nd Street, Richmond Hill, New York 11418 and Yeshivah Rambam, 3121 Kings Highway, Brooklyn, New York 11234, will move, on their own behalf and on behalf of all other schools similarly situated, at a stated motion part to be held at Room 506, the United States Courthouse, Foley Square, New York, New York, on the 10th day of November, 1970, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order:

(1) pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure permitting said schools to intervene as of right herein as parties defendant and directing that the proposed Answer annexed hereto be filed

Notice of Motion for Leave to Intervene

as the Answer of said intervenor-defendants herein, or in the alternative

(2) pursuant to Rule 24(b) of the Federal Rules of Civil Procedure permitting said schools to intervene by permission of the Court herein as parties defendant and directing that the proposed Answer annexed hereto be filed as the Answer of said intervenor-defendants herein, and

(3) granting to said proposed intervenor-defendants such other and further relief as may be just.

Dated: New York, N. Y.
October 30, 1970

Yours, etc.

DAVIS POLK & WARDWELL

By PORTER R. CHANDLER /s/
A Member

Attorneys for Cathedral Academy, St. Ambrose School, and Bishop Loughlin Memorial High School

1 Chase Manhattan Plaza
New York, New York 10005
212 HANover 2-3400

Notice of Motion for Leave to Intervene

JULIUS BERMAN and MARCEL WEBER

By MARCEL WEBER /s/

*Attorneys for Bais Yaakov
Academy for Girls and Yeshivah
Rambam*

425 Park Avenue

New York, New York 10022

212 PLaza 9-8400

To:

LEO PFEFFER, Esq.

Attorney for Plaintiffs

15 East 84th Street

New York, New York 10028

HONORABLE LOUIS J. LEFKOWITZ

Attorney General of the

State of New York

Attorney for Defendants

The Capitol

Albany, New York 12224

*Affidavit of Porter R. Chandler in Support of Motion
to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

PORTER R. CHANDLER, being duly sworn, says:

1. I am an attorney at law and a member of the firm of Davis Polk & Wardwell, attorneys for Cathedral Academy, 75 Park Avenue, Albany, New York 12202, St. Ambrose School, 31 Empire Bldg., Rochester, New York 14604, and Bishop Loughlin Memorial High School, 356 Clermont Avenue, Brooklyn, New York 11238, and I am fully familiar with the facts and circumstances herein. I make this affidavit in support of their motion to intervene as defendants in the above-entitled action pursuant to Rule 24 of the Federal Rules of Civil Procedure.

2. This action was commenced by the Committee for Public Education and Religious Liberty and thirteen individual plaintiffs, all of whom are described in the complaint. As described in the complaint, the organizational plaintiff Committee has commenced the above-entitled action as an unincorporated association with constituent organizations which have numerous members residing in the State of

*Affidavit of Porter R. Chandler in Support of Motion
to Intervene*

New York and who carry on activities in the Southern District of New York; the individual plaintiffs have commenced the above-entitled action as citizens of the United States and of the State of New York, residents of the State of New York and taxpayers to the State of New York. Plaintiffs Theodore Brooks, Herschel Chanin, Naomi Cowan, Blanche Lewis, Aryeh Neier and Albert Shanker are further described in the complaint as having children attending New York public schools.

3. The defendants are the Governor, the Comptroller and the Commissioner of Education of the State of New York.

4. The relief requested in the complaint is a declaration by a three-judge court that Chapter 138 of the Laws of 1970 (the "Act"), providing for the appropriation of funds of the State of New York to certain nonpublic schools in connection with inspection and examination, be declared unconstitutional and the named defendants be enjoined from approving or paying any funds of the State of New York to religiously affiliated schools, whether such approval is purported to be made pursuant to the Act or otherwise; and that a preliminary injunction pending trial of the issues be granted. The relief requested is premised on three different causes of action, which allege in substance that the statute and acts complained of violate the provision of the First Amendment to the Federal Constitution forbidding the establishment of religion, violate the individual plaintiffs' right to the free exercise of religion guaranteed by

*Affidavit of Porter R. Chandler in Support of Motion
to Intervene*

that Amendment, and violate Section 3 of Article XI of the Constitution of the State of New York in that they constitute the use of public money in aid or maintenance of religious schools.

5. Pursuant to the provisions of the Act, monies are paid to relieve partially the financial burden of complying with New York State regulations regarding examinations and inspection, a burden which falls on all nonpublic schools. The granting of the relief requested in the complaint would prevent the implementation of the program of state aid to nonpublic schools for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of tests and examinations, maintenance of records of pupil enrollment and health records and various other reports as required by law or regulation of the State of New York. In the alternative, the granting of relief requested in the complaint would allow the payment of funds to private schools not religiously affiliated while prohibiting it to schools so affiliated.

6. Plaintiffs do not complain of aid to all nonpublic schools. Although as stated in their prayers for relief they seek to have the statute in its entirety declared unconstitutional, the gravamen of their complaint and their alternative prayer for relief seek to have the Court prohibit only the giving of aid to schools which have a religious affiliation.

7. The proposed intervenors are three Roman Catholic schools, one secondary and two elementary, and two Jewish

*Affidavit of Porter R. Chandler in Support of Motion
to Intervene*

elementary schools, one of which has a high school division. Bishop Loughlin Memorial High School is a Roman Catholic secondary school for boys in Brooklyn with a present enrollment of approximately 1440 students. It was originally chartered by the State of New York as St. James High School on December 16, 1897. Its name was changed to St. James Diocesan High School in 1926 and to Bishop Loughlin Memorial High School on October 12, 1933. Cathedral Academy is a Roman Catholic coeducational elementary school in Albany with a present enrollment of 562 students. It has been in operation since September 1, 1861. St. Ambrose School is a Roman Catholic coeducational elementary school in Rochester with a present enrollment of 659 students. It was founded in 1924. These three schools are all qualified for receipt of funds under the Act and have applied, or intend to apply, for such funds. The Jewish schools which join in this motion for leave to intervene are described in the accompanying affidavit of Marcel Weber.

8. The proposed intervenors request to be made defendants in this lawsuit in order to represent their own interests and the interests of all those similarly situated.


9. I have been informed that there are throughout the State of New York 257 Catholic high schools, with an approximate total of 154,000 pupils, and 1,125 Catholic elementary schools, with an approximate total of 549,000 pupils, which are eligible for the apportionment of funds under the Act.

*Affidavit of Porter R. Chandler in Support of Motion
to Intervene*

10. The interest of the proposed intervenors in supporting the constitutionality of the law here under attack and in securing the benefits of that Act for their schools, is direct and vital. That interest is not now directly represented, and is not adequately represented by the original defendants, since the defendants themselves are not direct recipients of benefits conferred by the Act now challenged and are not members of the class for whose benefit the Act was enacted. All of the proposed intervenors, on the other hand, are members of the class which the Legislature intended to aid, and for whose benefit the law was enacted. Each and all of them are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest.

11. The proposed intervention will not delay or prejudice the adjudication of the rights of the original parties, and the main action and the defenses of the proposed intervenors have common questions of law and fact. The Attorney General of New York, attorney for the named defendants, has informed me that he is not opposed to the proposed intervention.

12. The complaint in this action was served and filed at the end of July, 1970. The named defendants have moved to dismiss the complaint on the grounds the Court lacks jurisdiction over the subject matter of the action and that the complaint fails to state a claim upon which relief can be granted, and for certain other relief. That motion is still pending.



*Affidavit of Porter R. Chandler in Support of Motion
to Intervene*

13. In accordance with Rule 24(c) of the Federal Rules of Civil Procedure, annexed hereto as Exhibit A is a proposed pleading setting forth the defenses for which intervention is sought.

WHEREFORE, it is respectfully requested that the motion of the proposed intervenors to intervene as defendants in this action be granted, that they be given leave to move to dismiss the complaint herein and to take part in the proceedings with respect to the motion to dismiss the complaint made by the named defendants, and that they be granted leave to take part in all future proceedings in this action and that they be granted such other, further, and different relief as to this Court may seem just and proper.

/s/ PORTER R. CHANDLER

[Jurat omitted in printing]

*Affidavit of Marcel Weber in Support of Motion
to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

MARCEL WEBER, being duly sworn, deposes and says:

1) I am an attorney at law and co-counsel to Yeshivah Rambam and Bais Yaakov Academy for Girls and I am fully familiar with all the facts and circumstances herein. I make this affidavit in support of their motion to intervene as defendants in the above entitled action, pursuant to Rule 24 of the Federal Rules of Civil Procedure.

2) The proposed intervenors, Yeshivah Rambam and Bais Yaakov Academy for Girls, are Jewish day schools and request to be joined as defendants in this lawsuit, in order to represent their own interests and the interests of all those similarly situated. Both of these schools are eligible and have applied for apportionment of funds under Chapter 138 of the Laws of 1970, the "Act".

3) The Bais Yaakov Academy for Girls was founded in 1959, as a Jewish elementary school, under the laws of the State of New York. In 1968 a high school division was started. The enrollment for the 1970-71 school year consists of 285 girls, of which 49 attend the high school.

*Affidavit of Marcel Weber in Support of Motion
to Intervene*

4) The Yeshivah Rambam is a co-educational elementary school, founded in 1945, under the laws of the State of New York, with an enrollment for the 1970-71 school year of 510 students.

5) I have been informed that there are, in New York State, 130 Jewish elementary schools with a total enrollment of approximately 41,000 pupils and 64 Jewish high schools, with a total enrollment of approximately 14,000 pupils.

6) I have read the accompanying affidavit of Porter R. Chandler and fully agree therewith. I have also read the proposed answer annexed thereto and, on behalf of my clients, subscribe to its contents.

WHEREFORE, it is respectfully prayed that the motion of Yeshivah Rambam and Bais Yaakov Academy for Girls and the other proposed intervenors, to intervene as defendants in this action, be granted and that they be given leave to take part in all proceedings in this action and that they be granted such other, further and different relief as to this Court may seem just and proper under the circumstances.

/s/ MARCEL WEBER

[Jurat omitted in printing]

Exhibit A Annexed to Motion to Intervene

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
 HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
 BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
 OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
 HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
 York, ARTHUR LEVITT, as Comptroller of the State of
 New York, and EWALD B. NYQUIST, as Commissioner of
 Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
 LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
 GIRLS and YESHIVAH RAMBAM,

Intervenor-defendants.

 ANSWER OF INTERVENOR-DEFENDANTS

Intervenor-Defendants Cathedral Academy, 75 Park Av-
 enue, Albany, New York 12202, St. Ambrose School, 31

Exhibit A Annexed to Motion to Intervene

Empire Building, Rochester, New York 14604 and Bishop Loughlin Memorial High School, 356 Clermont Avenue, Brooklyn, New York 11238 by their attorneys Davis Polk & Wardwell and intervenor-defendants Bais Yaakov Academy for Girls, 88-01 102nd Street, Richmond Hill, New York 11418 and Yeshivah Rambam, 3121 Kings Highway, Brooklyn, New York 11234 by Julius Berman and Marcel Weber, their attorneys, on their own behalf and on behalf of all other schools similarly situated, for their answer to the complaint herein:

1. Deny the allegations of paragraphs 1 and 2 except admit that this action purports to be brought as described therein.
2. Are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4 and 5.
3. Admit the allegations contained in paragraph 6 of the complaint.
4. Answering paragraph 7, admit that on April 18, 1970 defendant Nelson A. Rockefeller signed into law Chapter 138 of the Laws of 1970, effective September 1, 1970 (not July 1 as alleged), entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor" and respectfully refer to the said statute for the provisions thereof.
5. Are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in

Exhibit A Annexed to Motion to Intervene

paragraph 8 except deny that "unless enjoined by this court, [defendants] will . . . make such payment . . . in violation of the Constitution of the United States and the Constitution of the State of New York."

6. Admit the allegations of paragraphs 9 and 10.

7. Deny each and every allegation contained in paragraph 11 except are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the religious consciences of the plaintiffs.

8. Deny each and every allegation contained in paragraphs 12, 13, 14, 15 and 16.

FIRST DEFENSE

9. The complaint fails to set forth a claim against defendants upon which relief can be granted.

SECOND DEFENSE

10. Plaintiffs lack capacity to bring this action.

THIRD DEFENSE

11. This court lacks jurisdiction over the subject matter of this action in that the amount in controversy is less than \$10,000.00, exclusive of interest and costs.

FOURTH DEFENSE

12. This action seeks, among other things, to invalidate Chapter 138 of the Laws of 1970, to the extent that it provides for or permits payment to religiously-affiliated

Exhibit A Annexed to Motion to Intervene

schools, on the ground that the statute violates Article XI, Section 3 of the New York Constitution.

13. Said claim does not arise under the Constitution or laws of the United States and is purely a matter governed by the laws of the State of New York.

14. In the event that plaintiffs' contention under Article XI, Section 3 is sustained, no issue will or could arise under the Constitution or laws of the United States.

15. The Courts of the State of New York have not passed on the validity under the New York Constitution of Chapter 138 of the Laws of 1970, to the extent that it provides for or permits payments to religiously-affiliated schools.

16. By reason thereof, the complaint herein should be dismissed without prejudice so that the courts of the State of New York may pass upon the validity of said statute under the New York Constitution.

FIFTH DEFENSE

17. The intervenor-defendants and other schools similarly situated are created and operated in full compliance with the compulsory education laws of the State of New York. The pupils who attend these schools have the right, guaranteed by the constitutions of the United States and of the State of New York, so to attend. Said schools have a right under Chapter 138 of the laws of New York of 1970 to receive a per pupil allotment in accordance with a formula set forth therein to alleviate the financial burden

Exhibit A Annexed to Motion to Intervene

imposed upon them by the laws of the State of New York or political subdivisions thereof with respect to record keeping, examination and other administrative requirements.

18. To forbid the payment of funds under Chapter 138 to the intervenor-defendants and others similarly situated, which are schools lawfully created in compliance with the compulsory education laws as private schools conducted under religious auspices, while permitting payment of said funds to other private schools not conducted under religious auspices, would be an interference with the free exercise and enjoyment of religion by the intervenor-defendants and other schools similarly situated, by the pupils attending such schools and by their parents, and would be contrary to the First and Fourteenth Amendments to the Constitution of the United States and contrary to Article I, Section 3, of the Constitution of the State of New York.

SIXTH DEFENSE

19. Repeat and reallege paragraph 17 hereof.

20. To forbid the payment of funds under Chapter 138 to the intervenor-defendants and other schools similarly situated, which are lawfully created in accordance with the compulsory education laws as private schools conducted under religious auspices, while permitting the payment of such funds to other private schools not under religious auspices, would be a denial to the intervenor-defendants and other schools similarly situated, to the pupils attending such schools and to their parents of the equal protection of the laws and would discriminate against them because of their

Exhibit A Annexed to Motion to Intervene

creed and religion, contrary to the First and Fourteenth Amendments to the Constitution of the United States and contrary to Article I, Section 11, of the Constitution of the State of New York.

SEVENTH DEFENSE

21. Repeat and reallege paragraph 17 hereof.

22. To forbid the payment of funds under Chapter 138 to the intervenor-defendants and other schools similarly situated, which are lawfully created in accordance with the compulsory education laws as private schools conducted under religious auspices while permitting the payment of such funds to other private schools not under religious auspices, would be a deprivation and denial to the intervenor-defendants and other schools similarly situated, to the pupils attending such schools and to their parents of their liberty and property without due process of law and would be contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and contrary to Article I, Section 6, of the Constitution of the State of New York.

WHEREFORE, intervenor-defendants demand judgment dismissing plaintiffs' complaint and granting to said intervenor-defendants such other and further relief as may be just.

Exhibit A Annexed to Motion to Intervene

Dated: New York, New York

October 30, 1970

DAVIS POLK & WARDWELL

By

A Member

*Attorneys for Intervenor-Defendants
Cathedral Academy, St. Ambrose
School and Bishop Loughlin
Memorial High School*

Office and P. O. Address

1 Chase Manhattan Plaza

New York, New York 10005

212 HANover 2-3400

JULIUS BERMAN and MARCEL WEBER

By

*Attorney for Intervenor-Defendants
Bais Yaakov Academy for Girls
and Yeshivah Rambam*

Office and P. O. Address

425 Park Avenue

New York, New York 10022

212 PLaza 9-8400

Order Granting Leave to Intervene
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE
BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA
GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, ED-
WARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT
SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of
New York, and EWALD B. NYQUIST, as Commissioner of
Education of the State of New York,

Defendants.

ORDER

This cause coming on to be heard on the motion of Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam for leave to intervene as defendants in this action, and the Court having considered said motion, the affidavits of Porter R. Chandler sworn to on October 30, 1970 and Marcel Weber, sworn to on October 30, 1970, and the proposed answer submitted by the aforesaid inter-

Order Granting Leave to Intervene

venors, and it appearing to the Court that notice of said motion has been duly served on all parties to this action, that none of such parties is opposed to the proposed intervention, and that the said intervenors are entitled to become parties and should be permitted to intervene as defendants in this action, and the Court being fully advised in the premises, it is

ORDERED, that Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam have leave to intervene in this cause and are hereby made parties defendant thereto, and

IT IS FURTHER ORDERED that the proposed Answer of intervenor-defendants heretofore served on all other parties to this action be filed with the Clerk of this Court as the Answer of said intervenor-defendants.

/s/ MORRIS E. LASKER
United States District Judge

Dated: November 10, 1970

Answer of Defendants Levitt and Nyquist**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****70 Civ. 3251**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE
BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA
GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, ED-
WARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT
SHANKER and HOWARD SQUADRON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Defendants,

—and—

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE
SCHOOL, Rochester, New York, BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS
YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York,
and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

The defendants Arthur Levitt, as Comptroller of the
State of New York, and Ewald B. Nyquist, as Commissioner

Answer of Defendants Levitt and Nyquist

of Education of the State of New York, for their answer to the complaint herein allege:

1. Defendants admit allegations of paragraphs "7", "9", "10" and "15" of the complaint herein.

2. Defendants deny each and every allegation of paragraphs "3", "12", "13", "14" and "16" of the complaint herein.

3. Defendants deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "4", "5" and "11" of the complaint herein.

4. As to the allegations of paragraph "1" of the complaint herein, defendants admit that the allegations thereof set forth the express purpose of this action on behalf of plaintiffs but deny the legal conclusions set forth therein.

5. As to the allegations of paragraph "2" of the complaint herein, admit only that the complaint alleges that jurisdiction is conferred upon this Court by the cited sections of Title 28 of the United States Code, but deny any legal conclusions therefrom as to the merits of the action.

6. As to the allegations of paragraph "6" of the complaint herein, admit the allegations thereof, except allege that the complaint has been dismissed against the defendant Nelson A. Rockefeller and that he is no longer a party to this action.

7. As to the allegations of paragraph "8" of the complaint herein, admit that Chapter 138 of the Laws of 1970

Answer of Defendants Levitt and Nyquist

provides for payments for certain services to sectarian, as well as non-sectarian, nonpublic schools, but deny that such payments are in violation of either the Constitution of the United States or of the State of New York.

FOR A FIRST, SEPARATE AND DISTINCT
DEFENSE HEREIN, THE DEFENDANTS ALLEGE:

8. The complaint herein initially raises the question of whether or not Chapter 138 is valid under the provisions of Article XI, §3 of the Constitution of the State of New York, which prohibits the use of public moneys by the State in aid or maintenance, "other than for examination or inspection", or any school wholly or in part under the control or direction of any religious denomination or in which any denominational doctrine or tenet is taught. Chapter 138 specifically states that the moneys provided therein are to be apportioned and paid "for examination and inspection" in connection with the administration of tests and the maintaining of records required by the State of nonpublic schools.

9. The complaint alleges that the moneys provided for in Chapter 138 are not provided under the exception to the prohibition of Article XI, §3.

10. The first issue to be determined in this action, therefore, is whether the moneys so provided are or are not to be paid in accordance with said exception to the constitutional prohibition. If the New York State Constitution were interpreted to prohibit expenditures to sectarian schools under Chapter 138, as contended by the plaintiffs, then the

Answer of Defendants Levitt and Nyquist

issues raised under the Constitution of the United States need not be reached.

11. The construction of the State constitutional provision is a threshold question to the issues raised under the Constitution of the United States and the complaint should be dismissed on the ground that a Federal Court should not adjudicate the validity of a state statute fairly open to interpretation until the State Courts have been afforded a reasonable opportunity to interpret it.

FOR A SECOND, SEPARATE AND DISTINCT
DEFENSE HEREIN, THE DEFENDANTS ALLEGE:

12. The expressed purpose of Chapter 138 of the New York Laws of 1970 is to compensate nonpublic schools, without regard to their status as sectarian or nonsectarian schools, for expenses incurred by those schools in making reports to the State, keeping records required by the State, and in administering tests required by State law and regulation. State law requires that students enrolled in nonpublic schools comply with compulsory attendance requirements identical to those of the public schools, which entails the keeping of detailed attendance records by the nonpublic schools and reports to the State. State law requires that certain courses be taught in all schools, public and nonpublic alike, and that teachers in nonpublic schools have similar educational qualifications to those teaching in public schools. These requirements also entail the keeping of records and reports to the State Department of Education. Certain tests of academic achievement must be administered to students in nonpublic and public schools alike, and specific health records must be maintained.

Answer of Defendants Levitt and Nyquist

13. All of these records and test requirements involve additional expense to the nonpublic schools for which they are not compensated, although the public schools are partially compensated therefor in the form of state-aid.

14. The provisions of Chapter 138 constitute a partial reimbursement for the costs imposed on the nonpublic schools by State requirements and do not constitute a prohibited involvement with religion.

15. Chapter 138 has a secular legislative purpose, the insuring that nonpublic schools provide adequate education to children enrolled therein, and a primary effect which neither advances nor inhibits religion, since it provides only reimbursement for State imposed costs unrelated to any religious educational activity of the schools.

WHEREFORE, defendants Arthur Levitt, as Comptroller of the State of New York, and Ewald B. Nyquist, as Commissioner of Education of the State of New York, demand a judgment and decree of this Court dismissing the complaint herein and declaring Chapter 138 of the New York Laws of 1970 to be constitutional in all respects or dismissing the complaint herein on the ground that a Federal Court should not adjudicate the validity of a State statute until the State Courts have been afforded a reasonable opportunity to interpret it.

Answer of Defendants Levitt and Nyquist

Dated: Albany, New York
February 8, 1971.

LOUIS J. LEFKOWITZ
*Attorney General of the
State of New York*

By JEAN M. COON /s/
Assistant Attorney General
Attorney for Defendants
Levitt and Nyquist
The Capitol
Albany, New York 12224

Intervenor-Defendants' Interrogatories to Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

**COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, *et al.*,**

Plaintiffs,

—against—

**NELSON A. ROCKEFELLER, as Governor of the
State of New York, *et al.*,**

Defendants.

S I R S :

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiffs are required to answer the following interrogatories under oath within 30 days after service thereof:

1. Set forth each and every respect in which it is claimed at paragraph 12 of the complaint herein that Chapter 138 of the Laws of 1970, on its face, gives rise to governmental involvement in religion.

2. Set forth each and every respect in which it is claimed that said statute, as construed by defendants, gives rise to governmental involvement in religion.

Intervenor-Defendants' Interrogatories to Plaintiffs

3. With respect to plaintiffs' answers to Interrogatories 1 and 2, explain specifically and in detail plaintiffs' contentions that such involvement is "excessive", as alleged at paragraph 12 of the complaint.

4. Set forth each fact known to plaintiffs which supports their answer to Interrogatory 3, together with the source of each such fact.

5. Set forth each and every respect in which it is claimed at paragraph 12 of the complaint herein that said statute, on its face, gives rise to governmental entanglement with religion.

6. Set forth each and every respect in which it is claimed that said statute, as construed by defendants, gives rise to governmental entanglement with religion.

7. With respect to plaintiffs' answers to Interrogatories 5 and 6, explain specifically and in detail plaintiffs' contentions that such entanglement is "excessive", as alleged at paragraph 12 of the complaint.

8. Set forth each fact known to plaintiffs which supports their answer to Interrogatory 7, together with the source of each such fact.

9. Set forth each and every respect in which it is claimed that said statute, on its face, constitutes governmental action whose purpose and primary effect is to advance religion.

Intervenor-Defendants' Interrogatories to Plaintiffs

10. Set forth each and every respect in which it is claimed that said statute, as construed by defendants, constitutes governmental action whose purpose and primary effect is to advance religion.
11. Set forth each fact known to plaintiffs which supports their answers to Interrogatories 9 and 10, together with the source of each such fact.
12. Explain fully what plaintiffs mean by the term "governmental financing and subsidizing of schools . . .", as alleged at paragraph 12 of the complaint.
13. State whether plaintiffs contend that any moneys disbursed to religiously-affiliated private schools under said statute has been used for the instruction or dissemination of religious doctrine, or for the purchase of any goods or services in connection therewith. If so, set forth each fact known to plaintiffs which supports their answer, together with the source of each such fact.
14. Set forth each fact known to plaintiffs which supports the allegations made by them at paragraph 13 of the complaint, together with the source of each such fact.
15. Set forth each fact known to plaintiffs which supports the allegations made by them at paragraph 14 of the complaint, together with the source of each such fact.

Intervenor-Defendants' Interrogatories to Plaintiffs

16. With respect to the allegations made at paragraph 14, do plaintiffs contend that the portion of Article XI(3) of the New York Constitution providing:

“... other than for examination or inspection ...”

is inapplicable to Chapter 138 of the Laws of 1970?

17. If plaintiffs' answer to Interrogatory 16 is in the affirmative, state:

(a) whether it is claimed that the quoted portion of Article XI(3) is inapplicable on the face of Chapter 138 or as that statute has been construed by defendants or both;

(b) set forth each and every respect in which it is claimed that said provision is inapplicable to said statute;

(c) set forth each and every fact known to plaintiffs which supports their answers to Interrogatories 16 and 17(a)-(b), together with the source of each such fact; and

(d) set forth each legal authority upon which plaintiffs rely with respect to their answers to Interrogatories 16 and 17(a).

18. State the name and address of any witnesses whom plaintiffs expect to call to testify in this action, together with a summary of the nature of any such testimony.

Intervenor-Defendants' Interrogatories to Plaintiffs

Dated: New York, New York

March 19, 1971

DAVIS POLK & WARDWELL

By

A Member

Attorneys for Intervenor-Defendants

Cathedral Academy, St. Ambrose

School and Bishop Loughlin

Memorial High School

1 Chase Manhattan Plaza

New York, N. Y. 10005

JULIUS BERMAN and MARCEL WEBER

By

Attorneys for Intervenor-Defendants

Bais Yaakov Academy for Girls

and Yeshivah Rambam

425 Park Avenue

New York, N. Y. 10022

To:

LEO PFEFFER, Esq.

Attorneys for Plaintiffs

15 East 84th Street

New York, N. Y. 10028

HONORABLE LOUIS J. LEFKOWITZ

Attorney General of the

State of New York

80 Centre Street

New York, N. Y. 10013

Plaintiffs' Interrogatories to Intervenor-Defendants**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[TITLE OMITTED IN PRINTING]

SIRS:

The plaintiffs herein, pursuant to Rule 33 of the Federal Rules of Civil Procedure, propound the following interrogatories to the defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School, and demand that these interrogatories be answered fully and separately in the manner and within the time provided by law. The plaintiffs state that these interrogatories are continuing in nature and that at such time that further information becomes available, it shall be submitted as a further answer to these interrogatories.

1. As to each school, state whether an application or applications have been made for payments as provided for by Chapter 138 of the Laws of New York 1970. If so, please submit a copy of each such application.

2. (a) State whether any funds have been received by each of said schools pursuant to said law.

(b) If so, please set forth specifically what sums have been received up to the present time.

(c) If so, please specify in detail how and for what purposes these sums were expended.

Plaintiffs' Interrogatories to Intervenor-Defendants

(d) State if any audits were made by or for each of said schools indicating how the sums received from the state were expended. If any such audit or audits were made, please submit a copy of each.

(e) If sums were so received, state whether any report or reports have been submitted to any agency or officer of the State of New York regarding the expenditure of such funds and, if so, please submit copies of all such reports.

3. As to each school, state whether such school

(a) imposes religious restrictions on admissions;

(b) requires attendance of pupils at religious activities;

(c) requires obedience by students to the doctrines and dogmas of a particular faith;

(d) requires pupils to attend instruction in the theology or doctrine of a particular faith;

(e) is an integral part of the religious mission of the church sponsoring it;

(f) has as a substantial purpose of the institution the inculcation of religious values;

(g) imposes religious restrictions on faculty appointments; and

(h) imposes religious restrictions on what or how the faculty may teach.

Plaintiffs' Interrogatories to Intervenor-Defendants

Dated: New York, New York
February 3, 1972.

/s/ LEO PFEFFER

LEO PFEFFER

Attorney for Plaintiffs

15 East 84th Street

New York, New York 10028

To:

DAVIS POLK & WARDWELL

Attorneys for Intervenor-Defendants

1 Chase Manhattan Plaza

New York, New York 10005

HONORABLE LOUIS J. LEFKOWITZ

Attorney General of the State of New York

State Capitol

Albany, New York 12224

Plaintiffs' Interrogatories to Defendants**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[TITLE OMITTED IN PRINTING]

S I R S :

The plaintiffs herein, pursuant to Rule 33 of the Federal Rules of Civil Procedure, propound the following interrogatories to the defendants ARTHUR LEVITT and EWALD B. NYQUIST, and demand that these interrogatories be answered fully and separately in the manner and within the time provided by law. The plaintiffs state that these interrogatories are continuing in nature and that at such time that further information becomes available, it shall be submitted as a further answer to these interrogatories.

1. Referring to Section 2 of Chapter 138 of the Laws of New York 1970, state

(a) Whether any investigation had been made prior to the enactment of this law as to the amounts required to reimburse qualifying schools "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the

Plaintiffs' Interrogatories to Defendants

state of various other reports as provided for or required by law or regulation. . . .”

(b) If such an investigation was made, state when and by whom it was made.

(c) If such an investigation was made and its conclusions committed to writing, please submit a copy of the report of the investigation and of the conclusions.

(d) In the event the conclusions were not committed to writing, please summarize the conclusions and the bases upon which they were reached.

(e) On what basis was the formula for apportioning sums to each qualifying school as set forth in the law arrived at. If the formula was based on the estimated expenses to the qualifying schools of the services set forth in the law, please state whether the estimate was based upon all such services or only upon such services as are “provided for or required by law or regulation.”

2. Referring to the services listed in Section 2 of the law, please specify what services are “provided for or required by law or regulation.”

3. In applying the law, state whether the defendants interpret it to allow reimbursement for all services of the type set forth in the law or only those which are “provided for or required by law or regulation.”

4. State whether the qualifying schools are required to submit reports accounting for the moneys received and

Plaintiffs' Interrogatories to Defendants

how they are expended. If so, state what steps are taken to verify the correctness of these reports.

5. State whether any investigation had been made as to how the qualifying schools expend the sums received under this law. If so, state the result of such investigation, setting forth specifically what percentages are used for

(a) Services "provided for or required by law or regulation";

(b) Other services of the type set forth in the law though not provided for or required by law or regulation;

(c) Other purposes of the qualifying schools, specifying such purposes.

6. State if any reports or analyses have been made by defendants in respect to the use by qualifying schools of sums already apportioned to them under the law. If so, please submit a copy or copies thereof.

7. State whether or not in applying the law, schools are disqualified from receiving appointments thereunder if

(a) They impose religious restrictions on admissions;

(b) Require attendance of pupils at religious activities;

(c) Require obedience by students to the doctrines and dogmas of a particular faith;

(d) Require pupils to attend instruction in the theology or doctrine of a particular faith;

Plaintiffs' Interrogatories to Defendants

(e) The schools are an integral part of the religious mission of the church sponsoring it;

(f) The inculcation of religious values is a substantial purpose of the institution;

(g) They impose religious restrictions on faculty appointments; and

(h) They impose religious restrictions on what or how the faculty may teach.

8. State the name and official title of the person or persons responsible for the administration of the law.

9. State whether rules, regulations or guidelines for the administration of the law have been issued, and if so please submit copies of each.

10. State whether schools seeking funds under the law are required to submit applications therefor, and if so please submit forms of such applications.

11. (a) State whether schools receiving funds under the law are required to submit periodic reports on the expenditure of funds so received. If so, please submit a form of the report required to be submitted.

(b) If reports are required to be submitted, state whether these reports are audited or whether any other steps are taken and, if so, what steps, to verify their correctness.

55a

Plaintiffs' Interrogatories to Defendants

Dated: New York, New York
February 3, 1972.

/s/ LEO PFEFFER

LEO PFEFFER

Attorney for Plaintiffs

15 East 84th Street

New York, New York 10028

To:

HONORABLE LOUIS J. LEFKOWITZ

Attorney General of the State of New York

State Capitol

Albany, New York 12224

DAVIS POLK & WARDWELL

Attorneys for Intervenor-Defendants

1 Chase Manhattan Plaza

New York, New York 10005

**Plaintiffs' Answers to Intervenor-Defendants'
Interrogatories**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

S I R S :

The plaintiffs herewith submit the following Answers to the Interrogatories propounded by the Intervenor-Defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School:

1. Plaintiffs claim that Chapter 138 of the Laws of 1970 on its face gives rise to government involvement in religion in the following respects:

(a) The statute provides for direct grants to finance the operations of religious school systems which are the integral part of the religious mission of churches, and that the substantial religious character of these church related schools give rise to sustained and detailed administrative relationships of the kind the Religion Clauses of the First Amendment sought to avoid.

(b) The statute provides that grants to the parochial schools shall be on an annual basis, thereby requiring continuing governmental involvement in religion.

(c) The statute requires reports by the religious schools necessary for the carrying out of the purposes of the statute, thereby involving the government in religion.

*Plaintiffs' Answers to Intervenor-Defendants'
Interrogatories*

(d) The statute results in governmental involvement in religion by reason of the fact that it will cause political division along religious lines.

(e) To the extent that the statute requires that the moneys granted by the State thereunder be used only for the purposes set forth in Section 2 thereof, it requires governmental involvement in religion in the policing by the State of the administration of the law and of the religious schools to assure compliance with such requirements of the statute.

2. Plaintiffs claim that the defendants have construed the statute as set forth above in answer to Interrogatory 1 and that accordingly the answer to Interrogatory 1 is equally applicable to Interrogatory 2.

3. Plaintiffs contend that the involvement set forth in the answer to Interrogatory 1 is as a matter of law excessive.

4. Plaintiffs contend that the statute as a matter of law requires excessive involvement of government in religion. Plaintiffs reserve the right to submit additional facts showing in detail the actual involvement of government in religion in the administration of the statute since its enactment.

5. Answered above in response to Interrogatory 4.

6. Answered above in response to Interrogatory 4.

7. Answered above in response to Interrogatory 4.

*Plaintiffs' Answers to Intervenor-Defendants'
Interrogatories*

8. Answered above in response to Interrogatory 4.

9. Plaintiffs contend that the statute constitutes governmental action whose purpose and primary effect is to advance religion in that

(a) it provides for a direct subsidy of governmental funds for the operation of religious schools by reason of the fact that the expenses financed under Section 2 are ordinary and necessary expenses in the operation of all schools; and

(b) that the sums set forth in Section 2 bear no relationship to the expenses of services set forth in Section 2 and in fact the sums set forth in the statute exceed the amount required to pay for the expenses set forth in the section thus allowing the religious schools to utilize the excess for the teaching and advancement of religion.

10. Answered in response to Interrogatory 9.

11. Plaintiffs have been unable to find any facts which support the formula for payments set forth in Section 2 of the Act. Plaintiffs believe that the amounts set forth in the Act grossly exceed the sums necessary to pay the expenses of the services therein stated. Plaintiffs reserve the right to submit additional facts showing governmental action whose purpose and primary effect is to advance religion.

12. Plaintiffs mean by the term "governmental financing and subsidizing of schools" that (a) the funds provided for in the Act are used in part to subsidize the normally required operations of religious schools, and (b) to subsidize

*Plaintiffs' Answers to Intervenor-Defendants'
Interrogatories*

religious teachings and practices in those schools to the extent that the sums appropriated are not fully required to pay for the expenses of the services specified in Section 2 of the Act.

13. Plaintiffs contend that to the extent that the sums granted to the religious schools under the Act exceed the amounts necessary to pay the expenses of the services set forth in Section 2 of the Act, the said excesses are used in whole or in part for the instruction or dissemination of religious doctrine and for the purchase of goods or services in connection therewith. Plaintiffs reserve the right to submit additional facts in support of this contention.

14. It is against the conscience of the individual plaintiffs herein to contribute compulsorily to the teaching and dissemination of religious doctrine and that the use of tax raised funds for the payments provided for in the Act compels them to contribute to the teaching and dissemination of religious doctrine.

15. The statute on its face and as construed by defendants includes in its coverage schools wholly or in part under the control or direction of religious denominations and in which denominational tenets or doctrines are taught. Plaintiffs reserve the right to submit additional facts in answer to this Interrogatory.

16. Plaintiffs contend that the sums provided in Section 2 of the statute exceed the amounts necessary for payment

*Plaintiffs' Answers to Intervenor-Defendants'
Interrogatories*

of the services provided in that statute and to that extent Article XI(3) is inapplicable to the statute. Plaintiffs contend further that the services set forth in Section 2 of the statute go beyond "examination or inspection" and to that extent the said constitutional provision is inapplicable.

17. Answered in response to Interrogatory 16.

Dated: New York, New York
February 10, 1972.

/s/ LEO PFEFFER

LEO PFEFFER

Attorney for Plaintiffs

15 East 84th Street

New York, New York 10028

To:

DAVIS POLK & WARDWELL

1 Chase Manhattan Plaza

New York, New York 10005

Attorneys for Intervenor-Defendants

HON. LOUIS J. LEFKOWITZ

Attorney General of the State of New York

State Capitol

Albany, New York 12224.

[Certificate omitted in printing]

**Intervenor-Defendants' Answers to Plaintiffs'
Interrogatories**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

The intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School, for their answers to plaintiffs' written interrogatories served February 4, 1972, state:

Interrogatory 1. As to each school, state whether an application or applications have been made for payments as provided for by Chapter 138 of the Laws of New York 1970. If so, please submit a copy of each such application.

Answer: Cathedral Academy filed applications for payments for the school years 1970-71 and 1971-72. Copies of the Form SA-170 used for each year are appended hereto as Exhibits 1 and 2, respectively. St. Ambrose School filed applications for payments for the schools years 1970-71 and 1971-72. Copies of the Form SA-170 used for each year are appended hereto as Exhibits 3 and 4, respectively. Bishop Loughlin Memorial High School filed applications for payments for the school years 1970-71 and 1971-72. Copies of the Form SA-170 used for each year are appended hereto as Exhibits 5 and 6, respectively.

*Intervenor-Defendants' Answers to Plaintiffs'
Interrogatories*

Interrogatory 2(a). State whether any funds have been received by each of said schools pursuant to said law.

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School have received funds pursuant to the said law.

Interrogatory 2(b). If so, please set forth specifically what sums have been received up to the present time.

Answer:

	<u>1970-71</u>	<u>1971-72</u>
Cathedral Academy	\$15,311.70	\$ 7,347.28
St. Ambrose School	\$17,900.10	\$ 8,828.91
Bishop Loughlin M.H.S.	\$64,057.50	\$30,580.20

Interrogatory 2(c). If so, please specify in detail how and for what purposes these sums were expended.

Answer: The sums were received as reimbursement for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation during the school year 1970-71 and the school year 1971-72 to date and were deposited in the general account of each school.

*Intervenor-Defendants' Answers to Plaintiffs'
Interrogatories*

Interrogatory 2(d). State if any audits were made by or for each of said schools indicating how the sums received from the state were expended. If any such audit or audits were made, please submit a copy of each.

Answer: No audits are required by law or regulation, and none were made.

Interrogatory 2(e). If sums were so received, state whether any report or reports have been submitted to any agency or officer of the State of New York regarding the expenditure of such funds and, if so, please submit copies of all such reports.

Answer: No reports are required by law or regulation, and none were submitted.

Interrogatory 3. As to each school, state whether such school

(a) imposes religious restrictions on admissions;

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on admissions.

(b) requires attendance of pupils at religious activities;

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not require attendance of pupils at religious activities.

(c) requires obedience by students to the doctrines and dogmas of a particular faith;

*Intervenor-Defendants' Answers to Plaintiffs'
Interrogatories*

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not require obedience by students to the doctrines and dogmas of a particular faith.

(d) requires pupils to attend instruction in the theology or doctrine of a particular faith;

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School require pupils to attend the total instructional program including classes in the principles of the Roman Catholic faith.

(e) is an integral part of the religious mission of the church sponsoring it;

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School contribute to the religious mission of the Church, but are not an integral part thereof.

(f) has as a substantial purpose of the institution the inculcation of religious values;

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School have as a substantial purpose of the respective institutions the exposition of religious values and their function in life and learning, not the inculcation of such values.

(g) imposes religious restrictions on faculty appointments;

*Intervenor-Defendants' Answers to Plaintiffs'
Interrogatories*

Answer: Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on faculty appointments.

and (h) imposes religious restrictions on what or how the faculty may teach.

Answer: The teaching at Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School is restricted only to the extent that it should not be contrary to the tenets of the Roman Catholic Church.

Dated: New York, New York
March 2, 1972

DAVIS POLK & WARDWELL

By PORTER R. CHANDLER /s/
A Member thereof


*Attorneys for Intervenor-defendants
Cathedral Academy, St. Ambrose
School and Bishop Loughlin
Memorial High School*

1 Chase Manhattan Plaza
New York, N. Y. 10005

Telephone: HAnover 2-3400

[Certificates omitted in printing]

EXHIBIT 1 ANNEXED TO INTERVENOR-
DEFENDANTS' ANSWERS TO
PLAINTIFFS' INTERROGATORIES

(See Opposite) 

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with State Aided Programs, Division of Educational Finance by November 1, 1970. One copy should be retained in the school.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
DIVISION OF EDUCATIONAL FINANCE
STATE AIDED PROGRAMS
ALBANY, NEW YORK 12224

APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT

1970-71 School Year Form SA-170

1. Name of nonpublic school		CATHEDRAL ACADEMY	
2. Identification # _____ (Leave Blank)			
3. Location	75 PARK AVENUE	ALBANY	N.Y. 12202 Albany
	No. and Street	City, Town or Village	Zip Code County
4. Mailing address of school	No. and Street		Post Office N.Y. Zip Code County
5. Name of corporate entity	ALBANY DIOCESAN SCHOOL BOARD, INC.		
6. Mailing address of entity	40 NORTH MAIN CAVEAU		ALBANY N.Y. 12203 ALBANY
	No. and Street	Post Office	Zip Code County
7. Date school registered	_____		
8. Registered name	_____		
9. Date entity incorporated	23 October, 1970		
10. Incorporation name	ALBANY DIOCESAN SCHOOL BOARD, INC.		
11. Religious affiliation	ROMAN CATHOLIC		
12. Name of person completing this form	Sister Anne Martin, C.S.J.		
13. Telephone of person completing form	434 5232		

I, REVEREND THOMAS J. MALONEY the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a non-profit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law.

*Exhibit 1 Annexed to Intervenor-Defendants'
Answers to Plaintiffs' Interrogatories*

3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.
4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.
5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:
 - a) Patriotism and citizenship for all pupils over eight years of age
 - b) Correct use and display of the flag
 - c) Physical training for all pupils over eight years of age
 - d) Physiology and hygiene, including the nature and the effects on the human system of
 - 1) alcoholic drinks
 - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years)
 - e) The provisions of the Constitution of the United States in the eighth and higher grades
 - f) Highway safety and traffic regulations
 - g) Fire prevention and fire drills
 - h) Observe Conservation Day and provide instruction in this area
 - i) The humane treatment of animals and birds (in the elementary grades)
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.
7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.
8. It is conducting three civil defense shelter drills during each school year.
9. It has submitted the Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.
10. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

PART I

State of New York

County of ALBANY) ss

Rev. Thomas J. Maloney -----Chief Administrative

Officer of CATHEDRAL ACADEMY ALBANY, being duly sworn,
deposes and says that all statements in this application are true
to the best of his knowledge.

Signature Thomas J. Maloney
Chief Administrative Officer

Title Superintendent of Schools

PART II

I, Rev. Thomas J. Maloney -----, the undersigned do
certify that the corporate entity to which apportionments shall be
made in behalf of CATHEDRAL ACADEMY, ALBANY ----- school is
as follows -----
Albany Diocesan School Board, Inc. -----

and request that the Commissioner of Education approve such corporate
entity for the purposes of Chapter 138 of the Laws of 1970.

Signature Thomas J. Maloney
Chief Administrative Officer
Title Superintendent of Schools

Subscribed and sworn to before me this 29th -----
day of October ----- 1970.

ALBINO A. C. 1970
Notary Public
Cathedral Academy School Board, Inc.

Signature Thomas J. Maloney
Notary Public

EXHIBIT 2

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with the Office for Nonpublic School Services by October 1. One copy should be retained by the school.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
OFFICE FOR NONPUBLIC SCHOOL SERVICES
WASHINGTON AVENUE
ALBANY, NEW YORK 12224

MANDATED SERVICES
APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT
CHAPTER 138 OF THE LAWS OF 1970

1971-72 School Year Form SA-170

EXHIBIT 2 ANNEXED TO INTERVENOR-
DEFENDANTS' ANSWERS TO
PLAINTIFFS' INTERROGATORIES

1. Name of nonpublic school CATHEDRAL ACADEMY
2. Identification # 01-01-00-11-5470
3. Location 75 Park Avenue Albany N.Y. 12202 Albany
No. and Street City, Town or Village Zip Code County
4. Mailing address of school 75 Park Avenue Albany
No. and Street Post Office Zip Code County
5. Name of corporate entity ALBANY DIOCESAN SCHOOL BOARD, INC.
6. Mailing address of entity 60 North Main Avenue N.Y. 12202 Albany
No. and Street Post Office Zip Code County
7. Date school registered _____
8. Registered name _____
9. Date entity incorporated October 23, 1971
10. Incorporation name ALBANY DIOCESAN SCHOOL BOARD, INC.
11. Religious affiliation ROMAN CATHOLIC
12. Name of person completing this form Sister Anne Martin, C.S.J.
13. Telephone of person completing form 462-5222 (Area Code) 518

I, REVEREND THOMAS J. FOLEY the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a nonprofit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law. (NEW APPLICATION ONLY)

3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.

4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.

5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:

- a) Patriotism and citizenship for all pupils over eight years of age;
 - b) Correct use and display of the flag;
 - c) Physical training for all pupils over eight years of age;
 - d) Physiology and hygiene, including the nature and the effects on the human system of:
 - 1) alcoholic drinks
 - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years);
 - e) The provisions of the Constitution of the United States in the eighth and higher grades;
 - f) Highway safety and traffic regulations;
 - g) Fire prevention and fire drills;
 - h) Observe Conservation Day and provide instruction in this area;
 - i) The humane treatment of animals and birds (in the elementary grades);
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.

7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.

8. It is conducting three civil defense shelter drills during each school year.

9. It has submitted the attendance report AT6N, Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.

10. It has submitted the Pupil Evaluation Program Tests for third and sixth grades. Pupils who normally will be taking Regents or equivalent level courses are considered to be above the minimum competence level of the ninth-grade reading and arithmetic tests and may be excused from taking these tests.

11. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

County of Albany) ss

Chief Administrative

Officer of.....Cathedral Academy, Albany
deposes and says that all statements in this application are true
to the best of his knowledge. 11

is knowledge. *James J. Beland*
Signature.....
Chief Administrative Officer

.....Title.....Superintendent of Schools.....

I, Lawrence Thomas J. J. J. J., the undersigned

-----school
-----allany
-----board, inc.

and request that the Commissioner of Education approve such corporate entity for the purposes of Chapter 138 of the Laws of 1970.

Signature Thomas J. Maloney
Chief Administrative Officer

Title.....Superintendent of Schools

Subscribed and sworn to before me this-----

Day of *November* ----- 19*71*!

Thomas G. Lawrence
Notary Public

EXHIBIT 3

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with State Aided Programs, Division of Educational Finance by November 1, 1970. One copy should be retained in the school.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
DIVISION OF EDUCATIONAL FINANCE
STATE AIDED PROGRAMS
ALBANY, NEW YORK 12224

APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT

1970-71 School Year Form SA-170

EXHIBIT 3 ANNEXED TO INTERVENOR-
DEFENDANTS' ANSWERS TO
PLAINTIFFS' INTERROGATORIES

73a

1. Name of nonpublic school ST. AMEROSE SCHOOL
2. Identification # _____ (Leave Blank)
3. Location 31 EMPIRE BLVD. ROCHESTER N.Y. 14609 MONROE
No. and Street City, Town or Village Zip Code County
4. Mailing address of school _____
No. and Street Post Office N.Y. Zip Code County
5. Name of corporate entity DEPARTMENT OF EDUCATION, DIOCESE OF ROCHESTER, INC.
6. Mailing address of entity 50 CHESTNUT STREET ROCHESTER N.Y. 14604 MONROE
No. and Street Post Office Zip Code County
7. Date school registered _____
8. Registered name _____
9. Date entity incorporated _____
10. Incorporation name DEPARTMENT OF EDUCATION, DIOCESE OF ROCHESTER, INC.
11. Religious affiliation ROMAN CATHOLIC
12. Name of person completing this form SISTER ROSEMARY ST. PETER S.S.J.
13. Telephone of person completing form 716-288-0580

I, REV. DANIEL BRENT the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a non-profit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law.

*Exhibit 3 Annexed to Intervenor-Defendants'
Answers to Plaintiffs' Interrogatories*

3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.
4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.
5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:
 - a) Patriotism and citizenship for all pupils over eight years of age
 - b) Correct use and display of the flag
 - c) Physical training for all pupils over eight years of age
 - d) Physiology and hygiene, including the nature and the effects on the human system of
 - 1) alcoholic drinks
 - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years)
 - e) The provisions of the Constitution of the United States in the eighth and higher grades
 - f) Highway safety and traffic regulations
 - g) Fire prevention and fire drills
 - h) Observe Conservation Day and provide instruction in this area
 - i) The humane treatment of animals and birds (in the elementary grades)
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.
7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.
8. It is conducting three civil defense shelter drills during each school year.
9. It has submitted the Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.
10. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

PART I

State of New York

County of---MONROE-----) ss
-----)

--REV. DANIEL BRENT-----Chief Administrative

Officer of--ST. AMBROSE SCHOOL-----, being duly sworn,
deposes and says that all statements in this application are true
to the best of his knowledge.

Signature-----

Chief Administrative Officer

Title-----
SUPERINTENDENT OF SCHOOLS

PART II

I,---REV. DANIEL BRENT-----, the undersigned do

certify that the corporate entity to which apportionments shall be

made in behalf of--ST. AMBROSE SCHOOL, ROCHESTER-----school is

as follows--DEPARTMENT OF EDUCATION, DIOCESE OF ROCHESTER-----

and request that the Commissioner of Education approve such corporate
entity for the purposes of Chapter 138 of the Laws of 1970.

Signature-----

Chief Administrative Officer

Title-----
SUPERINTENDENT OF SCHOOLS

Subscribed and sworn to before me this-----

day of-----19--.

Notary Public

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with the Office for Nonpublic School Services by October 1. One copy should be retained by the school.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
OFFICE FOR NONPUBLIC SCHOOL SERVICES
WASHINGTON AVENUE
ALBANY, NEW YORK 12224

MANDATED SERVICES

APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT
CHAPTER 138 OF THE LAWS OF 1970

1971-72 School Year Form SA-170

EXHIBIT 4 ANNEXED TO INTERVENOR-
DEFENDANTS' ANSWERS TO
PLAINTIFFS' INTERROGATORIES

76a

1. Name of nonpublic school St. Ambrose
2. Identification # 26-08-01-16-6159
3. Location 31 Empire Blvd. Rochester N.Y. 14609 Monroe
No. and Street City, Town or Village Zip Code County
4. Mailing address of school N.Y.
No. and Street Post Office Zip Code County
Department of Education, Diocese of Rochester, Inc.
5. Name of corporate entity
6. Mailing address of entity 50 Chestnut St. Rochester N.Y. 14604 Monroe
No. and Street Post Office Zip Code County
7. Date school registered
8. Registered name
9. Date entity incorporated October 23, 1970
10. Incorporation name Department of Education, Diocese of Rochester, Inc.
11. Religious affiliation Roman Catholic
12. Name of person completing this form Sister Rosemary St. Peter
13. Telephone of person completing form 716-288-0580

I, Daniel Brent the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a nonprofit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law. (NEW APPLICATION ONLY)

*Exhibit 4 Annexed to Intervenor-Defendants'
Answers to Plaintiffs' Interrogatories*

3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.
4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.
5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:
 - a) Patriotism and citizenship for all pupils over eight years of age;
 - b) Correct use and display of the flag;
 - c) Physical training for all pupils over eight years of age;
 - d) Physiology and hygiene, including the nature and the effects on the human system of:
 - 1) alcoholic drinks
 - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years);
 - e) The provisions of the Constitution of the United States in the eighth and higher grades;
 - f) Highway safety and traffic regulations;
 - g) Fire prevention and fire drills;
 - h) Observe Conservation Day and provide instruction in this area;
 - i) The humane treatment of animals and birds (in the elementary grades);
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.
7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.
8. It is conducting three civil defense shelter drills during each school year.
9. It has submitted the attendance report AT6N, Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.
10. It has submitted the Pupil Evaluation Program Tests for third and sixth grades. Pupils who normally will be taking Regents or equivalent level courses are considered to be above the minimum competence level of the ninth-grade reading and arithmetic tests and may be excused from taking these tests.
11. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

State of New York

County of Monroe) ss
-----)

----- Daniel Brent ----- Chief Administrative

Officer of St. Ambrose School, Rochester, being duly sworn, deposes and says that all statements in this application are true to the best of his knowledge.

Signature -----
Chief Administrative Officer

Title ----- Superintendent of Schools

I, Daniel Brent, the undersigned do certify that the corporate entity to which apportionments shall be made in behalf of St. Ambrose School, Rochester is as follows Department of Education, Diocese of Rochester, Inc. and request that the Commissioner of Education approve such corporate entity for the purposes of Chapter 138 of the Laws of 1970.

Signature ----- Daniel Brent -----
Chief Administrative Officer

Title ----- Superintendent of Schools

Subscribed and sworn to before me this 22nd day of October 1971.

----- Leon G. Hart -----
Notary Public

LEON G. HART
Notary Public in the State of New York
MONROE COUNTY, N. Y.
-on Expires March 30, 19....

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with State Aided Programs, Division of Educational Finance by November 1, 1970. One copy should be retained in the school.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
DIVISION OF EDUCATIONAL FINANCE
STATE AIDED PROGRAMS
ALBANY, NEW YORK 12224

APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT

1970-71 School Year

Form SA-170

EXHIBIT 5 ANNEXED TO INTERVENOR-
DEFENDANTS' ANSWERS TO
PLAINTIFFS' INTERROGATORIES

1. Name of nonpublic school The Bishop Loughlin Memorial High School
2. Identification # (Leave Blank)
3. Location 357 Clermont Avenue Brooklyn N.Y. 11238 Kings
No. and Street City, Town or Village Zip Code County
4. Mailing address of school N.Y.
No. and Street Post Office Zip Code County
5. Name of corporate entity Education Department, Diocese of Brooklyn, Inc.
6. Mailing address of entity 345 Adams Street Brooklyn N.Y. 11201 Kings
No. and Street Post Office Zip Code County
7. Date school registered December 16, 1897, as St. James Academy of Brooklyn
8. Registered name name changed to The Bishop Loughlin Memorial High School
9. Date entity incorporated October 23, 1970
10. Incorporation name Education Department, Diocese of Brooklyn, Inc.
11. Religious affiliation Roman Catholic
12. Name of person completing this form Brother Baldwin Peter, DSC
13. Telephone of person completing form 212-857-2700

1. Franklin Fitzpatrick the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a non-profit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law.

EXHIBIT 5

3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.
4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.
5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:
 - a) Patriotism and citizenship for all pupils over eight years of age
 - b) Correct use and display of the flag
 - c) Physical training for all pupils over eight years of age
 - d) Physiology and hygiene, including the nature and the effects on the human system of
 - 1) alcoholic drinks
 - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years)
 - e) The provisions of the Constitution of the United States in the eighth and higher grades
 - f) Highway safety and traffic regulations
 - g) Fire prevention and fire drills
 - h) Observe Conservation Day and provide instruction in this area
 - i) The humane treatment of animals and birds (in the elementary grades)
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.
7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.
8. It is conducting three civil defense shelter drills during each school year.
9. It has submitted the Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.
10. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

PART I

State of New York

County of Kings) ss
(-----)

-----Franklin Fitzpatrick-----Chief Administrative

Officer of The Bishop Loughlin Memorial H.S., being duly sworn, deposes and says that all statements in this application are true to the best of his knowledge.

Signature *Franklin Fitzpatrick*
Chief Administrative Officer

Title Superintendent of Schools -----

I, ----- Franklin Fitzpatrick -----, the undersigned do certify that the corporate entity to which apportionments shall be made in behalf of The Bishop Loughlin Memorial H.S. -- school is as follows ----- Education Dept. of Diocese of Brooklyn, Inc. ----- and request that the Commissioner of Education approve such corporate entity for the purposes of Chapter 138 of the Laws of 1970.

Signature *Franklin Fitzpatrick*
Chief Administrative Officer

Title Superintendent of Schools -----

Subscribed and sworn to before me this 23rd -----

day of ----- October ----- 1970.

Mary L. Wolfe
Notary Public, State of New York
No. 24-9725150
Qualified in Kings County
Commission Expires March 30, 1971

Mary L. Wolfe
Notary Public

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with the Office for Nonpublic School Services by October 1. One copy should be retained by the school.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
OFFICE FOR NONPUBLIC SCHOOL SERVICES
WASHINGTON AVENUE
ALBANY, NEW YORK 12224

MANDATED SERVICES
APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT
CHAPTER 138 OF THE LAWS OF 1970

1971-72 School Year Form SA-170

EXHIBIT 6 ANNEXED TO INTERVENOR
DEFENDANTS' ANSWERS TO
PLAINTIFFS' INTERROGATORIES

1. Name of nonpublic school Bishop Loughlin High School
2. Identification # 30-00-00-12-6075
3. Location 357 Clermont Ave., Brooklyn, New York N.Y. 11238 Kings
No. and Street City, Town or Village Zip Code County
4. Mailing address of school 357 Clermont Ave., Adelphi N.Y. 11238 Kings
No. and Street Post Office Zip Code County
5. Name of corporate entity Department of Education, Diocese of Brooklyn, Inc.
6. Mailing address of entity 345 Adams St., Brooklyn N.Y. 11201 Kings
No. and Street Post Office Zip Code County
7. Date school registered October 12, 1933
8. Registered name The Bishop Loughlin Memorial High School
9. Date entity incorporated October 1970
10. Incorporation name Department of Education, Diocese of Brooklyn, Inc.
11. Religious affiliation Roman Catholic
12. Name of person completing this form Brother Denis Coakley, FSC
13. Telephone of person completing form (212) 857-2700

I, Brother Denis Coakley, FSC, the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a nonprofit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law. (NEW APPLICATION ONLY)

EXHIBIT 6

3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.
4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.
5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:
 - a) Patriotism and citizenship for all pupils over eight years of age;
 - b) Correct use and display of the flag;
 - c) Physical training for all pupils over eight years of age;
 - d) Physiology and hygiene, including the nature and the effects on the human system of:
 - 1) alcoholic drinks
 - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years);
 - e) The provisions of the Constitution of the United States in the eighth and higher grades;
 - f) Highway safety and traffic regulations;
 - g) Fire prevention and fire drills;
 - h) Observe Conservation Day and provide instruction in this area;
 - i) The humane treatment of animals and birds (in the elementary grades);
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.
7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.
8. It is conducting three civil defense shelter drills during each school year.
9. It has submitted the attendance report AT6N, Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.
10. It has submitted the Pupil Evaluation Program Tests for third and sixth grades. Pupils who normally will be taking Regents or equivalent level courses are considered to be above the minimum competence level of the ninth-grade reading and arithmetic tests and may be excused from taking these tests.
11. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

PART I

State of New York

County of Kings) ss
-----)

-- Brother Denis Coakley, FSC ----- Chief Administrative

Officer of Bishop Loughlin High School -----, being duly sworn,
deposes and says that all statements in this application are true
to the best of his knowledge.

Signature *Brother Denis Coakley*
Chief Administrative Officer

Title ----- Principal -----

PART II

I, Franklin E. Fitzpatrick -----, the undersigned do
certify that the corporate entity to which apportionments shall be
made in behalf of Bishop Loughlin High School ----- school is
as follows Department of Education, Diocese of Brooklyn, Inc.

and request that the Commissioner of Education approve such corporate
entity for the purposes of Chapter 188 of the Laws of 1970.

Signature *Franklin E. Fitzpatrick*
Chief Administrative Officer

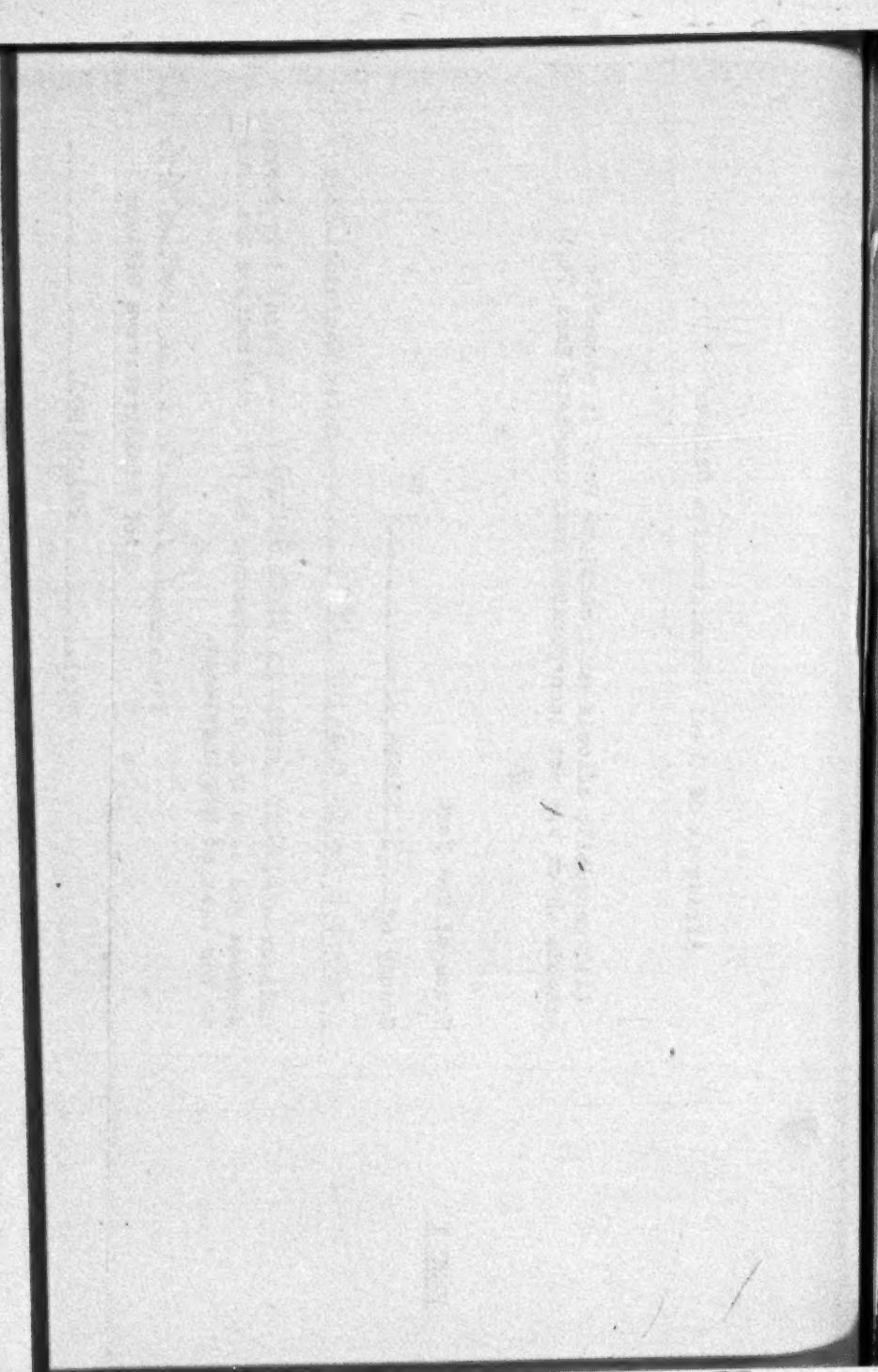
Title ----- Superintendent -----

Subscribed and sworn to before me this 21st -----

day of October ----- 1971.

Mary L. Wolfe
Notary Public, State of New York
No. 24-9725150
Qualified in Kings County
Commission Expires March 30, 1972

Mary L. Wolfe
Notary Public



**Defendant Nyquist's Answers to Plaintiffs'
Interrogatories**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF ALBANY, ss.:

EWALD B. NYQUIST, being duly sworn deposes and says:

A. That he is the Commissioner of Education of the State of New York, President of the University of the State of New York and Chief Executive Officer of the Board of Regents of the University of the State of New York.

B. That this affidavit is made in answer to interrogatories propounded by plaintiffs in the above entitled cause pursuant to Rule 33 of the Federal Rules of Civil Procedure, dated February 3, 1972.

C. That the following numbered paragraphs of this affidavit refer to the corresponding numbered paragraphs of the said interrogatories, and are, respectively, in answer to each respective numbered paragraph thereof.

1. On information and belief:

That prior to the enactment of Chapter 138 of the Laws of 1970, a conference was held in which representatives of the Office of the Counsel to the Governor, of the Division of the

Defendant Nyquist's Answers to Plaintiffs' Interrogatories

Budget in the Executive Department and of the State Education Department participated; that at said conference the representatives of the State Education Department were asked whether the dollar amount in question was reasonable and that the answer was that to the best of their judgment the amount was reasonable; that no record of the said conference was made.

2. On information and belief:

That the States of the Union have the right to require certain minimum standards of educational quality to be maintained by nonpublic schools, in accordance with the decision of the United States Supreme Court in the *Pierce* cases (268 U.S. 510) and that New York State has set such standards through the requirements of various sections of the Education Law, such as the provisions of Article 17 thereof which require certain subjects to be taught in nonpublic as well as public schools and most notably through the provisions of sections 3204 and 3210 thereof, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to that of the public schools of the district of location of the nonpublic school and of the district of residence of the student; that, furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers and duties of the Commissioner of Education, states that he shall have general supervision over all schools and institutions which are subject to the provisions of the Education Law or any other statute relating to education and that he must cause all these schools to be examined and inspected; that for the purpose of controlling the educational quality of the

Defendant Nyquist's Answers to Plaintiffs' Interrogatories

State education system, various measuring devices are used by the Education Department, such as the Regents examinations, the so called "PEP Tests" (Pupil Evaluation Program) in grades 3, 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department.

That, in addition, various reports are required from non-public as well as public schools, all of which procedures and devices having the purpose of making sure that the minimum State educational standards are maintained throughout all the schools in the State. That, in specific answer to this question of interrogatories, all the services rendered by nonpublic schools in connection with the maintenance of said minimum State standards are "provided for or required by law or regulation".

3. On information and belief, that the said chapter 138 provides for reimbursement for all the various testing, reporting and evaluation programs referred to in paragraph 2 above.

4. That the qualifying schools are not required to submit reports accounting for the moneys received and how they are expended.

5. That this question cannot be answered as posed, since we are here dealing with reimbursement for moneys already expended for the purposes set forth in said chapter 138; that, more particularly, the nonpublic schools' moneys, necessarily, have to be expended, in advance of reimbursement, for 100% of the services "provided for or required by law or regulation".

Defendant Nyquist's Answers to Plaintiffs' Interrogatories

6. That cost analyses and other studies have been made by the department and copies thereof are submitted herewith and made a part hereof, as Exhibits d, f and g.
7. That nonpublic schools are not disqualified from receiving apportionments made under said chapter 138 for any of the reasons set forth in this paragraph of the interrogatories.
8. That the affiant is responsible for the administration of said chapter 138 and that he is assisted in this connection by Dr. Thomas D. Sheldon, Deputy Commissioner for Elementary, Secondary and Continuing Education and by Dr. Thomas W. Heath, Coordinator for Nonpublic School Services.
9. That a publication entitled "LAW REGULATIONS AND GUIDELINES Apportionment to Nonpublic Schools" was issued by the Department in August of 1970 and that a copy thereof is submitted herewith and made a part hereof, as Exhibit e.
10. That schools seeking funds under said chapter 138 are required to submit an application on Form SA-170, together with a worksheet, Form SA-171 and that copies thereof are submitted herewith and made a part hereof as Exhibits h(1) and h(2).
11. That schools receiving funds under said chapter 138 are not required to submit periodic or other reports on the expenditure of funds received thereunder.

Defendant Nyquist's Answers to Plaintiffs' Interrogatories

D. That submitted herewith, and made a part hereof are the following documents and materials, as Exhibits a through i:

a. Regents Statement on State Aid, February 27, 1970.

b. Release from Board of Regents dated April 17, 1970.

c. "Legal Information Concerning School Attendance", November 1969.

d. "Cost analysis data" (Confidential papers re non-public schools mandated services), March 25, 1971.

e. "LAW REGULATIONS AND GUIDELINES Apportionment to Nonpublic Schools", August 1970.

f. "Background Information on the Nonpublic School Bill", April 16, 1970, together with BEDS for nonpublic schools, Fall 1969 and "Secondary School Report" for "Private Schools" 1969-70.

g. Materials submitted to the Regents by Dr. Sheldon, August 1971.

h(1). SA-170.

h(2). SA-171.

i. Education Department staff study "Financial Support of Nonpublic Schools".

/s/ EWALD B. NYQUIST

EWALD B. NYQUIST

[Jurat omitted in printing]

[Exhibits a through i to these Answers to
Interrogatories are in the separate, bound
Supplement to Appendix]

Stipulation re Answers to Interrogatories

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERNARD BACKER, ALGERNON D. BLACK, THEODORE
 BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA
 GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, ED-
 WARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT
 SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
 York, ARTHUR LEVITT, as Comptroller of the State of
 New York, and EWALD B. NYQUIST, as Commissioner of
 Education of the State of New York,

Defendants,

—and—

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
 LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
 GIRLS and YESHIVAH RAMBAM,

Intervenor-Defendants.

IT IS HEREBY STIPULATED that the answers filed by defen-
 dant Ewald B. Nyquist, as Commissioner of Education,
 and by the intervenor-defendants Cathedral Academy, St.
 Ambrose School and Bishop Loughlin Memorial High
 School, to the interrogatories propounded to them by the
 plaintiffs, and the exhibits thereto, may be taken as ac-
 cepted facts for the purposes of this case.

Stipulation re Answer to Interrogatories

Dated: New York, N.Y.

April 4, 1972

/s/ LEO PFEFFER

Leo Pfeffer

Attorney for Plaintiffs

Louis J. Lefkowitz

*Attorney General of the
State of New York*

By JEAN M. COON /s/
Asst. Sol. Gen.

*Attorney for defendants Arthur
Levitt, as Comptroller of the State of
New York and Ewald B. Nyquist, as
Commissioner of Education of the
State of New York*

Davis Polk & Wardwell

By PORTER R. CHANDLER /s/
*Attorneys for Intervenor-Defendants
Cathedral Academy, St. Ambrose
School and Bishop Loughlin Memo-
rial High School*

Julius Berman and Marcel Weber

By JULIUS BERMAN /s/
*Attorneys for Intervenor-Defendants
Bais Yaakov Academy for Girls and
Yeshivah Rambam*

**Opinions of Lasker, J. and Palmieri, J.
dated April 27, 1972**

[printed in full in Appendixes to Jurisdictional Statements; officially reported at 342 F. Supp. 439 and 342 F. Supp. 445, respectively]

Order and Judgment dated June 1, 1972

[printed in full in Appendixes to
Jurisdictional Statements]

**Order to Show Cause and Affidavit in Support
of Application for Leave to Intervene**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Upon the annexed motion of Earl W. Brydges and the affidavit of John F. Haggerty and Louis P. Contiguglia, sworn to the 15th day of June, 1972 and the proposed answer annexed thereto and upon all prior proceedings heretofore had herein, it is hereby:

ORDERED, that the plaintiffs and the defendants herein show cause before this Court, at Room 905 of the United States Court House, Foley Square, New York, New York at 10 o'clock in the forenoon on the 20th day of June, why an order pursuant to Rule 24 should not issue allowing Senator Earl W. Brydges, President Pro Tem and Majority Leader of the New York State Senate, to intervene in this case as a party defendant in his representative capacity and that he have all the rights and standing of a party on the grounds that in his respective capacity and on behalf of the New York State Senate he has a direct, vital and paramount interest in the subject matter of this action that in his representative capacity as party defendant the disposition of this action may as a practical matter impair or impede his ability to protect the interests of the Senate of the State of New York and on the ground that the applicant's interests are not presently and ade-

Order to Show Cause

quately represented herein in view of the fact that only the Legislature can develop the issues which must be inherent in any determination of this Court; and it is further

ORDERED that personal service of a copy of this order and the papers upon which it was granted, or service by delivery to a mail box by the close of business on the 16th day of June, 1972, upon the attorneys appearing for each of the named parties herein, shall constitute due and sufficient service of this order.

Dated: New York, New York
June 16, 1972

/s/ MORRIS E. LASKER

To:

PORTER R. CHANDLER, Esq.
One Chase Manhattan Plaza
New York, New York 10005

LEO PFEFFER, Esq.
Attorney for Plaintiffs
15 East 84th Street
New York, New York 10028

HONORABLE LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Mrs. Jean M. Coon
Assistant Solicitor General

Affidavit in Support of Application for Leave to Intervene

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF ALBANY, ss.:

JOHN F. HAGGERTY and LOUIS P. CONTIGUGLIA, being individually duly sworn, depose and say:

1) Each is an attorney licensed to practice law in the State of New York, and each is a Counsel to the Senate of the State of New York and to Senator Earl W. Brydges, the Majority Leader and President Pro Tem of the New York State Senate, and that each deponent makes this affidavit in support of the order to show cause why, in his representative capacities for and on behalf of the Senate of the State of New York and as Majority Leader and President Pro Tem of the New York State Senate, Senator Earl W. Brydges should not be allowed to intervene in this case as party defendant.

2) A motion of this nature may properly be addressed to and decided by any one judge of a three-judge court (28 USCA Section 2284(5)).

Affidavit in Support of Application for Leave to Intervene

3) Senator Earl W. Brydges is also a citizen of the United States of America and a resident of the State of New York. As a citizen, a State legislator, Majority Leader of the State Senate and President Pro Tem of one of the two legislative bodies of the New York State Legislature, Senator Earl W. Brydges has a paramount interest in common with the other members of the New York State Senate in upholding the constitutionality of Chapter 138 of the 1970 Laws of New York. The purpose for the intervention of Senator Earl W. Brydges in this action is to protect the interest of the New York State Legislature in the exercise of its constitutional right to a free and open debate of any subject or issue, no matter how politically divisive it may be on segments of our society. The exercise of this right has been curtailed by recent Federal court decisions involving issues similar to those in this law suit. Those decisions have expressly, and by innuendo, curtailed the rights of State legislative bodies to freely and openly debate issues which are "potentially divisive." The basis of these Federal court decisions is the opinion of the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In that case the Court observed that:

"Ordinarily, political debate and division, however vigorous or even partisan, are normal manifestation of our democratic system of government, but political division along religious lines was one of the evils against which the First Amendment was intended to protect."

Affidavit in Support of Application for Leave to Intervene

"The potential divisiveness of such conflict is a threat to the normal political process."

The Supreme Court issued this pronouncement in declaring unconstitutional a Pennsylvania law providing public funds for teaching non-religious courses in private schools. In so ruling the Court acknowledged its chief concern was not whether the law aided religion, but that it involved "excessive entanglement" of religion in government. This entanglement, the Court concluded, violated the First Amendment provisions of separation of church and state. The Court implied that this excessive entanglement exists in the normal political activity of our legislative bodies when considering issues which peripherally touch upon a religious question. The Supreme Court's reaction in *Lemon v. Kurtzman* to entanglement of religion and government cannot be taken as a "passing fancy." In recent months other Federal courts have relied upon the pronouncement in the *Lemon* case to curtail efforts by various legislative bodies throughout the country to seek solutions to the fiscal plight of nonpublic schools.

For example, in March of this year a three-panel Federal court declared unconstitutional a Vermont law which partially reimbursed public school teachers for teaching non-religious courses in parochial schools. (*Americans United for Separation of Church and State v. Oakey*, 40 L.W. 2597 (1972)). The court noted:

"Any such involvement carries with it the explosive potential for citizen friction and political sub-division along religious lines."

Affidavit in Support of Application for Leave to Intervene

Similar restrictions on the freedom of state legislatures to debate issues involving religious overtones was evidenced in the month of March of this year when Federal courts in Pennsylvania and Ohio struck down laws reimbursing parents for children's tuition payments in private schools. (*Wolman v. Essex*, USDC, SE Dist., Ohio (1972)). Particularly significant is the decision of the Federal court in Ohio, which states, in part, that the plan

"... contains the seeds for increased political involvement along religious lines at every level of government. ... To uphold this statute would be to introduce the religious issue to the very center of state politics. ... the political issue will be an expansive one ... with the result that the issue will be joined along sharply drawn religious lines."

The three-panel Federal district court in its recent March decision in this case has likewise implied that restrictions are imposed on the freedom of the state legislature to debate legislation touching on religious issues. The majority decision noted that

"... it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents."

The pronouncement of the Supreme Court in the *Lemon* case, as applied in this line of recent Federal cases, has been resorted to with devastating consequences. Underway is a dangerous trend to restrict the freedom historically

Affidavit in Support of Application for Leave to Intervene

enjoyed by the New York State Legislature and other legislative bodies to respond to diverse problems, which by necessity demands free and open discussion of every conceivable issue. As noted by Judge Edmund Palmieri in his dissent in this action,

“Government and political activity should play a part in searching for ways . . . that will preserve, and indeed promote, the diversity of individual beliefs—political, social and religious—that distinguish us so plainly from certain uniform, unified and unigoverned societies elsewhere in the world.”

In the event that this concept curtailing legislative debate is continued in this action, no longer will legislative bodies operate as a forum for free and open discussion. Indeed there is a danger that the resolution of peculiarly volatile issues will no longer continue within the framework of our democratic process. It is submitted that the unfortunate trend that may develop from these recent Federal court decisions is to encourage elements of our society to seek solutions to our social, political and economic problems in a manner that is “extra-legal.”

4) On information and belief, the interests of the New York State Legislature may not be adequately represented by the named government-party defendants in this action. The primary concern of the named party defendants is to uphold the payments authorized by Chapter 138 of the 1970 Laws of New York. The interest of Senator Earl W. Brydges, as intervenor in his representative capacity as

Affidavit in Support of Application for Leave to Intervene

leader of one of the two major Houses of the New York State Legislature, is much broader.

The Courts of the United States have attempted to exercise a jurisdiction so large and so great in terms of breadth and width, that sometimes those who serve in the States of the Union lose track of the fact that the Federal Government is not the paramount body in the United States of America. In the Federal Government and its Judiciary does not repose the sovereignty, except to the extent that the States have given it to them. The sovereignty of the individual and of the States under the reserved powers concept (U.S. Constitution Articles IX and X) reposes not there but with the States, and the fact that the States do have this residuum of sovereignty makes theirs the responsibility of preserving that which remains.

It is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its debate. Clearly, the states have allowed and authorized the courts of the United States to pass upon the constitutional issues of our final product, the statutes which we pass. But no where can be found the authority for the courts to dictate that which would be the subject of colloquy.

Only the Legislature can address itself to this question and it is beyond the possibility or reach of their respective offices for the aforementioned defendants in this action to give any consideration or representation on this issue. Your applicant in his representative capacity as President Pro Tem of the New York State Senate and as its Majority

Affidavit in Support of Application for Leave to Intervene

Leader, empowered by its own rules to control the proceedings and debate within the body, is the only one so situated as to fairly and adequately come to grips with this question.

5) It is indeed questionable whether the named government defendants are truly the real parties in interest in this action. Under the Constitution of the State of New York, it would seem clear that it is the Legislature, and the Legislature only, that is so situated as to claim the paramount interest relating to the property or transaction which is the subject of this law suit. It is peculiarly the Legislature's interest that the disposition of this action may as a practical matter impair or impede.

The first-named defendant, ARTHUR LEVITT, as Comptroller of the State of New York, is charged simply with the responsibility of auditing claims and vouchers filed with or against New York State. His participation in this proceeding is simply in the capacity of a "paymaster" without responsibility for the formulation of educational policies within the State of New York or the education of the children of the State of New York.

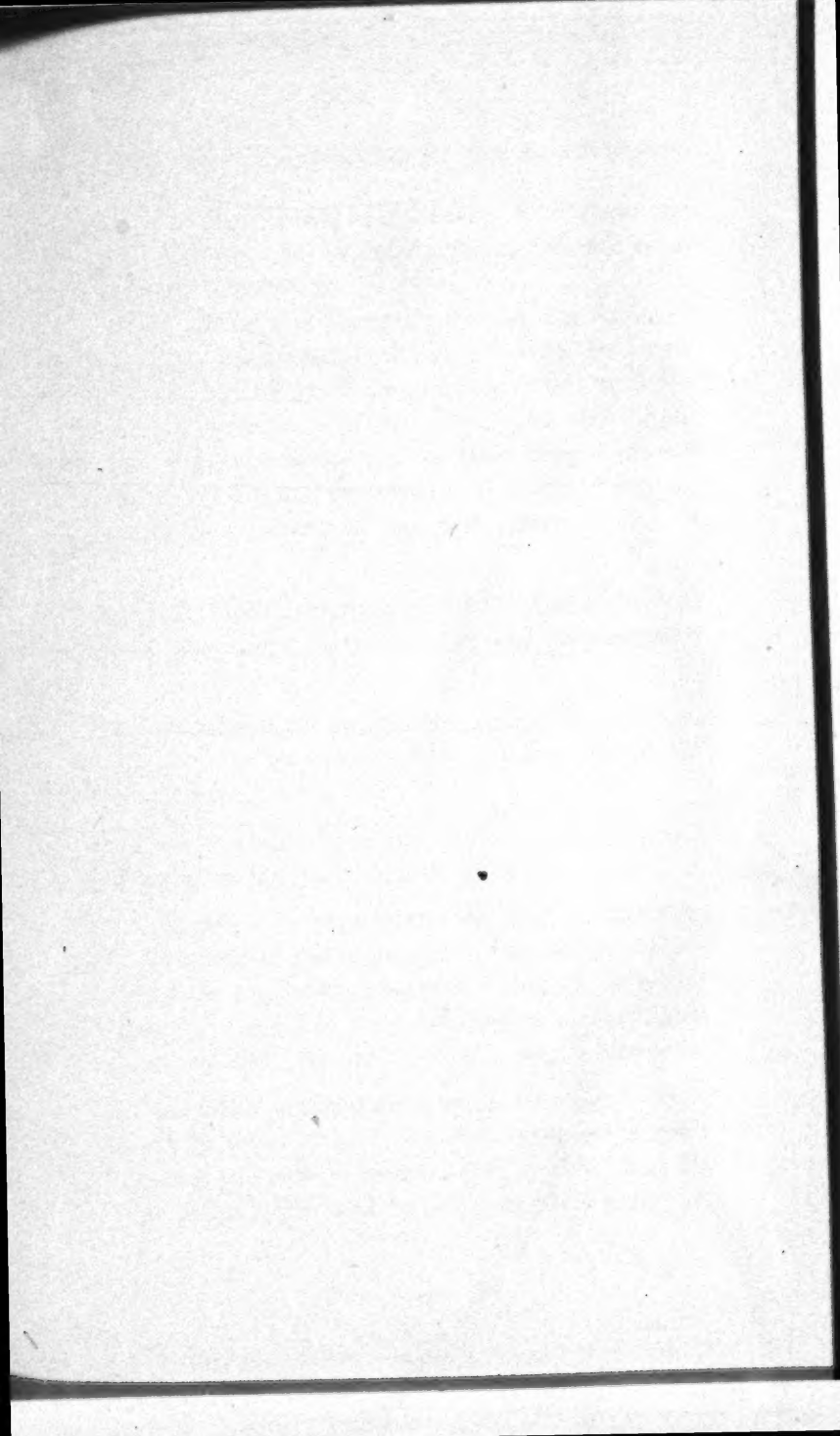
The second-named defendant, EWALD B. NYQUIST, is the Commissioner of Education of the State of New York. Pursuant to Article V Section 4 of the New York State Constitution, he is appointed by the Board of Regents of the State of New York. The powers and authority of the Board of Regents of the State of New York, pursuant to the Constitution of the State of New York, Article XI Section 2, may be increased, modified or diminished by

Affidavit in Support of Application for Leave to Intervene

the Legislature. Section 1 of Article XI of the New York State Constitution charges the Legislature of the State of New York with the maintenance and support of a system of free common schools wherein all the children of this State may be educated. It would appear then to be beyond question that the ultimate responsibility both for determining educational policy and for providing for the education of the children of the State of New York is with the Legislature and not the Commissioner of Education of the State of New York.

It is claimed in this action that the State statute under attack involves the expenditure of public funds in support of religious purposes. The determination of how public funds should be expended is a coordinate responsibility of the Legislature and the Executive Branch of government and does not in any way involve the aforementioned defendants herein. It should be noted that under the Constitution of the State of New York, the Legislature has even the ultimate say as to how public monies should be expended, in that the Governor submits a proposed budget to the Legislature which the Legislature may or may not adopt in whole or in part and a rejection of any of the parts by the Legislature is final on the question.

It would be singularly the responsibility of the Legislature of the State of New York to impose the necessary taxes to raise revenues to support the educational burden that would be created by a sudden, precipitous and catastrophic closing of the nonpublic schools of this State which presently educate approximately 800,000 children or 20% of



Affidavit in Support of Application for Leave to Intervene

all children attending schools in our State. Such fiscal and political consequences can be fully appreciated and evaluated only by the Legislature.

Thus, it is submitted that the entity that has the foremost interests in the subject matter of this action is the Legislature of the State of New York and it is in his capacity as a primary representative of that entity that your applicant seeks to intervene in this action. Only your applicant can adequately develop and represent to this court the three paramount issues inherent in any determination of this action:

(i) The reserved sovereign power of the Legislature of the State of New York to uninhibited and untrammelled debate.

(ii) The responsibility for the development of educational policy and the education of the children within the State of New York.

(iii) The responsibility of raising taxes to support a system of education in the State of New York.

6) Your deponents in requesting this court to allow intervention on behalf of the applicant in this action assures this court that the applicant or anyone acting on his behalf will not delay or prejudice the adjudication of the rights of the original parties. We are ready to proceed forthwith.

7) The reason this application is made by order to show cause and not by notice of motion is that a request is made that this matter be made returnable on Tuesday, June 20, 1972. Upon information and belief your deponents are

Affidavit in Support of Application for Leave to Intervene

advised that another proceeding in this action is returnable in this court on that date and it is requested that this application for intervention be made returnable at that time so that it may be disposed of by this court on that date and that your deponents on behalf of Senator Earl W. Brydges be allowed to participate in those other proceedings in this action on that date.

8) In accordance with Rule 24(c) of the Federal Rules of Civil Procedure, annexed hereto as Exhibit A, is a proposed pleading setting forth the defenses for which intervention is sought.

9) No previous application has been made to any court or any judge for the relief requested herein.

WHEREFORE, it is requested that Senator Earl W. Brydges as Majority Leader and President Pro Tem of the New York State Senate be allowed to intervene in this case as a party defendant, or in such representative capacity, and on behalf of other senators in the New York State Senate similarly situated, that he have all the rights and standing of a party, and for such other and further relief as to this Court may seem just and proper.

/s/ JOHN F. HAGGERTY
JOHN F. HAGGERTY

/s/ LOUIS P. CONTIGUGLIA
LOUIS P. CONTIGUGLIA

[Jurat omitted in printing]

Exhibit A Annexed to Motion to Intervene

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of
New York, and EWALD B. NYQUIST, as Commissioner of
Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
GIRLS and YESHIVAH RAMBAM,

Intervenor-defendants,

and

EARL W. BRYDGES, as Majority Leader and President
Pro Temp of the New York State Senate,

Intervenor-defendant.

Exhibit A Annexed to Motion to Intervene

ANSWER OF INTERVENOR-DEFENDANT

Intervenor-Defendant Earl W. Brydges, residing at Niagara Falls, New York, as Majority Leader and President Pro Tem of the New York State Senate, by his attorneys John F. Haggerty and Louis P. Contiguglia, in his representative capacity for and on behalf of the Senate of the State of New York and as Majority Leader and President Pro Tem of the New York State Senate, for his answer to the complaint herein:

1. Denies the allegations of paragraphs 1 and 2 except admits that this action purports to be brought as described therein.
2. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4 and 5.
3. Admits the allegations contained in paragraph 6 of the complaint.
4. Answering paragraph 7, admits that on April 18, 1970 defendant Nelson A. Rockefeller signed into law Chapter 138 of the Laws of 1970, effective September 1, 1970 (not July 1 as alleged), entitled "An Act to provide for the apportionment of state monies to certain non-public schools in connection with inspection and examination, and making an appropriation therefor" and respectfully refers to the said statute for the provisions thereof.

Exhibit A Annexed to Motion to Intervene

5. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 except denies that "unless enjoined by this court, [defendants] will . . . make such payment . . . in violation of the Constitution of the United States and the Constitution of the State of New York."

6. Admits the allegations of paragraphs 9 and 10.

7. Denies each and every allegation contained in paragraph 11 except is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the religious consciences of the plaintiffs.

8. Denies each and every allegation contained in paragraphs 12, 13, 14, 15 and 16.

FIRST DEFENSE

9. The complaint fails to set forth a claim against defendants upon which relief can be granted.

SECOND DEFENSE

10. Plaintiffs lack capacity to bring this action.

THIRD DEFENSE

11. This court lacks jurisdiction over the subject matter of this action in that the amount in controversy is less than \$10,000.00, exclusive of interest and costs.

*Exhibit A Annexed to Motion to Intervene***FOURTH DEFENSE**

12. This action seeks, among other things, to invalidate Chapter 138 of the Laws of 1970, to the extent that it provides for or permits payment to religiously-affiliated schools, on the ground that the statute violates Article XI, Section 3 of the New York Constitution.

13. Said claim does not arise under the Constitution or laws of the United States and is purely a matter governed by the laws of the State of New York.

14. In the event that plaintiffs' contention under Article XI, Section 3 is sustained, no issue will or could arise under the Constitution or laws of the United States.

15. The Courts of the State of New York have not passed on the validity under the New York Constitution of Chapter 138 of the Laws of 1970, to the extent that it provides for or permits payments to religiously-affiliated schools.

16. By reason thereof, the complaint herein should be dismissed without prejudice so that the courts of the State of New York may pass upon the validity of said statute under the New York Constitution.

FIFTH DEFENSE

17. The federal government and its judiciary lack jurisdiction to proscribe the parameters of debate of the Legislature of the State of New York.

U

Exhibit A Annexed to Motion to Intervene

SIXTH DEFENSE

18. The expressed purpose of Chapter 138 of the New York Laws of 1970 is to compensate nonpublic schools, without regard to their status as sectarian or nonsectarian schools, for expenses incurred by those schools in making reports to the State, keeping records required by the State, and in administering tests required by State law and regulation. State law requires that students enrolled in nonpublic schools comply with compulsory attendance requirements identical to those of the public schools, which entails the keeping of detailed attendance records by the nonpublic schools and reports to the State. State law requires that certain courses be taught in all schools, public and nonpublic alike, and that teachers in nonpublic schools have similar educational qualifications to those teaching in public schools. These requirements also entail the keeping of records and reports to the State Department of Education. Certain tests of academic achievement must be administered to students in nonpublic and public schools alike, and specific health records must be maintained.

19. All of these records and test requirements involve additional expense to the nonpublic schools for which they are not compensated, although the public schools are partially compensated therefor in the form of state-aid.

20. The provisions of Chapter 138 constitute a partial reimbursement for the costs imposed on the nonpublic schools by State requirements and do not constitute a prohibited involvement with religion.

Exhibit A Annexed to Motion to Intervene

21. Chapter 138 has a secular legislative purpose, the insuring that nonpublic schools provide adequate education to children enrolled therein, and a primary effect which neither advances nor inhibits religion, since it provides only reimbursement for State imposed costs unrelated to any religious educational activity of the schools.

WHEREFORE, defendant Earl W. Brydges, in his representative capacity as Majority Leader and President Pro Tem of the Senate of the State of New York, demands a judgment and decree of this Court dismissing the complaint herein and declaring Chapter 138 of the New York Laws of 1970 to be constitutional.

Dated: Albany, New York
June 15, 1972

/s/ JOHN F. HAGGERTY
John F. Haggerty

/s/ LOUIS P. CONTIGUGLIA
Louis P. Contiguglia
*Attorneys for Intervenor-
Defendant*
Earl W. Brydges
The Capitol
Senate Chambers
Albany, New York

Order Granting Leave to Intervene
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERNARD BACKER, ALGERNON D. BLACK, THEODORE
 BROOKS, HERSCHEL CHANIN, NAOMI COWEN, REBECCA
 GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, ED-
 WARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT
 SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
 York, ARTHUR LEVITT, as Comptroller of the State of
 New York, and EWALD B. NYQUIST, as Commissioner of
 Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
 LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
 GIRLS and YESHIVAH RAMBAM,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and Presi-
 dent Pro Tem of the New York State Senate,

Intervenor-Defendant.

ORDER

Order Granting Leave to Intervene

A motion having come on to be heard, by order to show cause, why an order, pursuant to Rule 24, should not issue allowing Senator Earl W. Brydges, President Pro Tem and Majority Leader of the New York State Senate, to intervene in this case as a party defendant in his representative capacity and that he have all the rights and standing of a party, and the Court having considered said motion and the proposed answer tendered therewith, and it appearing to the Court that due and sufficient notice of said motion has been served on all parties to this cause, and there being no opposition thereto, and due deliberation being had thereon, it is

ORDERED that Senator Earl W. Brydges in his representative capacity as the Majority Leader and President Pro Tem of the New York State Senate, has leave to intervene in this cause and is hereby made a party thereto and to that end may file his said answer and he is hereby authorized to participate in all prospective proceedings in this cause in the same manner and with like effect as if named an original party to this cause.

/s/ PAUL R. HAYS

U.S.C.J.

/s/ EDMUND L. PALMIERI

U.S.D.J.

/s/ MORRIS E. LASKER

U.S.D.J.

Dated: June 27, 1972

Answer of Intervenor-Defendant Brydges**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[TITLE OMITTED IN PRINTING]

Intervenor-Defendant Senator Earl W. Brydges, residing at Niagara Falls, New York, as Majority Leader and President Pro Tem of the New York State Senate, by his attorneys John F. Haggerty and Louis P. Contiguglia, in his representative capacity for and on behalf of the Senate of the State of New York and as Majority Leader and President Pro Tem of the New York State Senate, for his answer to the complaint herein:

1. Denies the allegations of paragraphs 1 and 2 except admits that this action purports to be brought as described therein.

2. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4 and 5.

3. Admits the allegations contained in paragraph 6 of the complaint.

4. Answering paragraph 7, admits that on April 18, 1970 defendant Nelson A. Rockefeller signed into law Chapter 138 of the Laws of 1970, effective September 1, 1970 (not July 1 as alleged), entitled "An Act to provide for the

Answer of Intervenor-Defendant Brydges

apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor" and respectfully refers to the said statute for the provisions thereof.

5. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 except denies that "unless enjoined by this court, (defendants) will . . . make such payment . . . in violation of the Constitution of the United States and the Constitution of the State of New York."

6. Admits the allegations of paragraphs 9 and 10.

7. Denies each and every allegation contained in paragraph 11 except is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the religious consciences of the plaintiffs.

8. Denies each and every allegation contained in paragraphs 12, 13, 14, 15 and 16.

FIRST DEFENSE

9. The complaint fails to set forth a claim against defendants upon which relief can be granted.

SECOND DEFENSE

10. Plaintiffs lack capacity to bring this action.

*Answer of Intervenor-Defendant Brydges***THIRD DEFENSE**

11. This court lacks jurisdiction over the subject matter of this action in that the amount in controversy is less than \$10,000.00, exclusive of interest and costs.

FOURTH DEFENSE

12. This action seeks, among other things, to invalidate Chapter 138 of the Laws of 1970, to the extent that it provides for or permits payment to religiously-affiliated schools, on the ground that the statute violates Article XI, Section 3 of the New York Constitution.

13. Said claim does not arise under the Constitution or laws of the United States and is purely a matter governed by the laws of the State of New York.

14. In the event that plaintiffs' contention under Article XI, Section 3 is sustained, no issue will or could arise under the Constitution or laws of the United States.

15. The Courts of the State of New York have not passed on the validity under the New York Constitution of Chapter 138 of the Laws of 1970, to the extent that it provides for or permits payments to religiously-affiliated schools.

16. By reason thereof, the complaint herein should be dismissed without prejudice so that the Courts of the State of New York may pass upon the validity of said statute under the New York Constitution.

*Answer of Intervenor-Defendant Brydges***FIFTH DEFENSE**

17. The federal government and its judiciary lack jurisdiction to proscribe the parameters of debate of the Legislature of the State of New York.

SIXTH DEFENSE

18. The expressed purpose of Chapter 138 of the New York Laws of 1970 is to compensate nonpublic schools, without regard to their status as sectarian or nonsectarian schools, for expenses incurred by those schools in making reports to the State, keeping records required by the State, and in administering tests required by State law and regulation. State law requires that students enrolled in nonpublic schools comply with compulsory attendance requirements identical to those of the public schools, which entails the keeping of detailed attendance records by the nonpublic schools and reports to the State. State law requires that certain courses be taught in all schools, public and nonpublic alike, and that teachers in nonpublic schools have similar educational qualifications to those teaching in public schools. These requirements also entail the keeping of records and reports to the State Department of Education. Certain tests of academic achievement must be administered to students in nonpublic and public schools alike, and specific health records must be maintained.

19. All of these records and test requirements involve additional expense to the nonpublic schools for which they are not compensated, although the public schools are partially compensated therefor in the form of state-aid.

Answer of Intervenor-Defendant Brydges

20. The provisions of Chapter 138 constitute a partial reimbursement for the costs imposed on the nonpublic schools by State requirements and do not constitute a prohibited involvement with religion.

21. Chapter 138 has a secular legislative purpose, the insuring that nonpublic schools provide adequate education to children enrolled therein, and a primary effect which neither advances nor inhibits religion, since it provides only reimbursement for State imposed costs unrelated to any religious educational activity of the schools.

WHEREFORE, intervenor-defendant Senator Earl W. Brydges, in his representative capacity as Majority Leader and President Pro Tem of the Senate of the State of New York, demands a judgment and decree of this Court dismissing the complaint herein and declaring Chapter 138 of the New York Laws of 1970 to be constitutional.

Dated: Albany, New York
July 1, 1972

/s/ JOHN F. HAGGERTY
JOHN F. HAGGERTY

/s/ LOUIS P. CONTIGUGLIA
LOUIS P. CONTIGUGLIA

*Attorneys for Intervenor-Defendant
Earl W. Brydges
The Capitol
Senate Chambers
Albany, New York 12224*

**Order Noting Probable Jurisdiction
and Consolidating Appeals**

SUPREME COURT OF THE UNITED STATES

Nos. 72-269, 72-270, and 72-271

Arthur Levitt, as Comptroller of the State of New York,
and Ewald B. Nyquist, as Commissioner of Education
of the State of New York,

Appellant,

v.

Committee for Public Education and
Religious Liberty, *et al.*;

Earl W. Brydges, as Majority Leader and
President pro tem of New York State Senate,

Appellant,

v.

Committee for Public Education and
Religious Liberty *et al.*; and
Cathedral Academy *et al.*,

Appellants,

v.

Committee for Public Education and
Religious Liberty *et al.*

APPEALS from the United States District Court for the
Southern District of New York.

*Order Noting Probable Jurisdiction
and Consolidating Appeals*

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

November 6, 1972

A true copy MICHAEL RODAK, JR.

Test:

Clerk of the Supreme Court of the
United States

By

(Illegible)

Deputy

Supreme Court of the United States

No.s. 72-269, 72-270, and 72-271

Arthur Levitt, as Comptroller of the State
of New York, and Ewald B. Nyquist, as
Commissioner of Education of the State of
New York,

Appellant,

v.

Committee for Public Education and Religious
Liberty, et al.;

Earl W. Brydges, as Majority Leader and President
pro tem of New York State Senate,

Appellant,

v.

Committee for Public Education and Religious
Liberty et al.; and

Cathedral Academy et al.,

Appellants,

v.

Committee for Public Education and Religious
Liberty et al.

APPEALS from the United States District Court

for the Southern District of New York.

The statements of jurisdiction in these cases having
been submitted and considered by the Court, probable jurisdic-
tion is noted. The cases are consolidated and a total of one
hour is allotted for oral argument.

November 6, 1972

S U P P L E M E N T T O A P P E N D I X

[Exhibits A through I to Defendant
Nyquist's Answers to Plaintiffs'
Interrogatories, App., pp. 85a-90a]

-K-12-Public Schools

REGENTS STATEMENT
ON STATE AID

The Board of Regents today adopted the following statement:

Regents Statement

State Aid to Public Schools 1970-71

In November of 1969 the Regents presented major recommendations for legislative action which included a series of proposals to increase State aid to the public schools. Those proposals were designed to meet what we described as "the fiscal crisis in the schools."

Now at the beginning of March, the third month of this legislative session, we are compelled to comment again about the seriousness of that crisis in the public school districts across this State. The fiscal crisis has not gone away. In fact, it deepens with each passing day and week.

The financial plight of our school districts is not limited to a particular kind of district or a particular location. The rural and suburban districts with skyrocketing tax rates, the cities with their tax and debt limits and their special burdens for welfare, public protection and other services -- the various districts across the State all face the same problem -- they lack sufficient

(more)

money to meet their rising costs.

In November of 1969 we proposed several measures to increase State aid which taken together constitute a balanced support program we consider to be the absolute minimum. Since that time a number of alternative proposals have been put forward, each one having different effects on individual districts.

We have reviewed these proposals. We have matched them against the facts of the fiscal crisis as we know them. We are convinced more than ever that our November proposals will best meet the varying needs of districts across the State. We would hope, as everyone does, that less money would be required to meet the crisis, but it will not. We urge the Legislature to adopt the Regents proposals.

Non-Public Education

We express again our concern for the financial plight of the non-public elementary and secondary schools of the State. There is a definite inter-relation between their plight and the financial problems of the public schools, which, if the non-public sector were to diminish substantially, will have to make provision for many additional students.

We believe that the instruction in secular subjects provided in non-public schools serves a public purpose and that public funds may properly be appropriated to assist the secular education process. We further believe that assistance cannot be deferred.

We therefore urge adoption by the Legislature of measures which will make it possible within constitutional limits, for non-public schools to continue existence without further substantial decrease in pupil attendance.

*Legal Information
concerning
School Attendance*

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Bureau of School Social Services
Albany, New York 12224

September 1970
(Revised)

**Legal Information
concerning
School Attendance**

**The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Bureau of School Social Services
Albany, New York 12224**

**September, 1970
(revised)**

The University of the State of New York

Regents of the University
(With years when terms expire)

1984	Joseph W. McGovern, A.B., LL.B., L.H.D., LL.D., D.C.L., Chancellor.....	New York
1985	Everett J. Penny, B.C.S., D.C.S., Vice Chancellor.....	White Plains
1978	Alexander J. Allan, Jr., LL.D., Litt.D.....	Troy
1973	Charles W. Millard, Jr., A.B., LL.D., L.H.D.....	Buffalo
1972	Carl H. Pforzheimer, Jr., A.B., M.B.A., D.C.S., H.H.D....	Purchase
1975	Edward M. M. Warburg, B.S., L.H.D.....	New York
1977	Joseph T. King, LL.B.....	Queens
1974	Joseph C. Indelicato, M.D.....	Brooklyn
1976	Mrs. Helen B. Power, A.B., Litt.D., L.H.D.....	Rochester
1979	Francis W. McGinley, B.S., LL.B., LL.D.....	Glens Falls
1980	Max J. Rubin, LL.B., L.H.D.....	New York
1971	Kenneth B. Clark, A.B., M.S., Ph.D., Litt.D.....	Hastings on Hudson
1982	Stephen K. Bailey, A.B., B.A., M.A., Ph.D., LL.D.....	Syracuse
1983	Harold E. Newcomb, B.A.....	Owego
1981	Theodore M. Black, A.B.....	Sands Point

PRESIDENT OF THE UNIVERSITY AND COMMISSIONER OF EDUCATION

Ewald B. Nyquist

EXECUTIVE DEPUTY COMMISSIONER OF EDUCATION

Gordon M. Ambach

ASSOCIATE COMMISSIONER FOR INSTRUCTIONAL SERVICES

Philip B. Langworthy

DIRECTOR, DIVISION OF PUPIL PERSONNEL SERVICES

Bruce E. Shear

CHIEF, BUREAU OF SCHOOL SOCIAL SERVICES

Wallace M. Lornell

FOREWORD

The State Education Department receives many requests for an extract of the laws concerning school attendance. This bulletin has been prepared in response to those requests. It attempts to assemble in pamphlet form most of the laws and regulations frequently referred to by administrators, attendance teachers, supervisors, and others involved in matters relating to school attendance.

The Bulletin has been prepared in loose-leaf form. This has been done so that when letters, opinions, or interpretations of the law and regulation are released they can be added or included in future additions of the bulletin. School personnel can also attach to their copies pertinent information as it becomes available. In this way a comprehensive handbook on attendance and related areas can be developed.

Inquiries concerning information in this publication should be addressed to the Bureau of School Social Services, State Education Department, Albany, New York, 12224.

Henry R. Kunze
David H. Smith
Associates in School Attendance

Table of Contents

New York State Laws Concerning School Attendance

<u>Section</u>	<u>Page</u>
3201. No Exclusion On Account of Race, Creed, Color or National Origin	1
3202. Public Schools Free to Resident Pupils; Tuition From Nonresident Pupils	1
3203. Selection of School for Attendance of Children When District Line Intersects a Dwelling	2
3204. Instruction Required	3
3205. Attendance of Minors Upon Full Time Day Instruction	6
3206. Attendance of Minors Upon Part Time Instruction	6
3207. Attendance Upon Evening Instruction	7
3207-a. (Recitation Periods in High School Evening Session)	8
3208. Attendance of Minors, Proper Mental and Physical Condition	8
3209. Duties of Public Welfare Officials With Respect to Indigent Children	9
3210. Amount and Character of Required Attendance	9
3211. Records of Attendance Upon Instruction	10
3212. Definition of Persons in Parental Relation and Their Duties; Duties of Certain Minors and Other Persons	11
3213. Supervisors of Attendance; Attendance Teachers; Attendance Officers, Appointment, Compensation, Powers and Duties	12
3214. School For Delinquents	15
3215. Unlawful Employment	17
3216. Employment Certificate	19

<u>Section</u>	<u>Page</u>
3216-c. Certain Types of Employment of Children Prohibited; Other Authorized Upon Consent of Local Authorities	20
3217. Procedure for Issuance of Employment Certificates	22
3218. Evidence of Age	22
3219. Consent of Parent or Guardian	23
3220. Certificate of Physical Fitness	23
3221. Job Description	24
3222. Schooling Record	24
3223. Duties of Employers	25
3224. Temporary Services	25
3225. Special Employment Certificate	26
3226. Farm Work Permits	26
3227. Street Trades; Definition and General Regulations	27
3228. Newspaper Carrier Boy	28
3229. Certain Types of Employment of Children Prohibited; Others Authorized Upon Consent of Local Educational Authorities	29
3230. Employment of Children as Models	31
3231. General Provisions	33
3232. Courts Having Jurisdiction	34
3233. Penalties	34
3234. Enforcement; Withholding State Moneys by Commissioners of Education	35
3240. School Census in the Cities of New York, Buffalo, and Rochester	35
3241. School Census in Cities	35
3242. School Census in School Districts	36
3243. Penalty for Withholding Information	37

Commissioners Regulations Concerning School Attendance

	<u>Page</u>
TEACHERS CERTIFICATE	
80.29 Attendance teacher	38
EXEMPTIONS FROM ATTENDANCE	
101.1 Definitions	39
101.2 Exemption from attendance	39
101.3 Certificate of exemption	40
101.4 Examination and recommendation	40
101.5 Notices	41
101.6 Transfers	41
101.7 Pupil attendance record-keeping	41
RELIGIOUS OBSERVANCE AND EDUCATION	
109.2 Absence from school	42
CHILD PERFORMANCES	
190.1 Issuance of consents	43
190.2 Employment or exhibition of children as models	44
EMPLOYMENT CERTIFICATES	
191.1 Casual employment for which employment certificate is not required	46
Related Laws	47
Index of Laws and Commissioner's Regulations	48

3201. NO EXCLUSION ON ACCOUNT OF RACE, CREED, COLOR OR NATIONAL ORIGIN.

No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin.

3202. PUBLIC SCHOOLS FREE TO RESIDENT PUPILS; TUITION FROM NONRESIDENT PUPILS.

1. A person over five and under twenty-one years of age is entitled to attend the public schools maintained in the district or city in which such person resides without the payment of tuition. A veteran of any age who shall have served as a member of the armed forces of the United States and who shall have been discharged therefrom under conditions other than dishonorable, may attend any of the public schools of the state upon conditions prescribed by the board of education, and the attendance of such veterans shall be counted for state aid purposes. Nothing herein contained shall, however, require a board of education to admit a child who becomes five years after the school year has commenced unless his birthday occurs on or before the first of December.

2. Nonresidents of a district, if otherwise competent, may be admitted into the school or schools of a district or city, upon the consent of the trustees or the board of education, upon terms prescribed by such trustees or board.

3. The school authorities of a district or city must deduct from the tuition of a nonresident pupil, whose parent or guardian owns property in such district or city and pays a tax thereon for the support of the schools maintained in such district or city, the amount of such tax.

4. Children cared for in a duly incorporated orphan asylum or other institution for the care, custody and treatment of children, other than the children of the officers and employees of such institution, shall not, by reason of their presence in such institution, be deemed to be residents of the school district in which such institution is located. The trustees or other authorities in charge of any such institution may contract with the trustees or board of education of the school district in which such institution is located for the secular instruction of such children. If such children are supported and maintained at the expense of a public welfare district, the cost of the secular instruction of such children in the school or schools in the district shall be paid by the public welfare district which is liable for the payment of the cost of their support and maintenance. If such children are not supported and maintained at the expense of a public welfare district, the cost of the secular

instruction of such children in the school or schools in the district shall be a charge upon and shall be paid by the school district responsible for their instruction at the time of their admittance to said duly incorporated orphan asylum or other institution for the care, custody and treatment of children. The trustees or board of education of the school district in which such institution is located shall receive such children in the school or schools of the district for instruction for a compensation to be fixed by the trustees or board of education, unless such trustees or board of education shall establish to the satisfaction of the commissioner of education that there are valid and sufficient reasons for refusal to receive such children.

5. Children cared for in free family homes, and children cared for in family homes at board, when such family homes shall be the actual and only residence of such children or such children have been removed from the custody of their parents by order of the children's court, shall be deemed residents of the school district in which such family homes is located. Other children cared for in family homes at board shall not be deemed residents of the school district in which such family homes are located, but shall receive free tuition in the school district in which such family homes are located, unless the trustees or board of education of such school district shall establish to the satisfaction of the commissioner of education that there is a valid and sufficient reason for refusal to receive such children or that the reception of such children in the school or schools imposes an unreasonable additional operating cost on such school district. In the latter case the commissioner of education may decide that tuition shall be paid for such children, in which case he shall fix the amount of tuition to be paid by the person responsible for the support of any such child or children. If any such child is a charge on any public welfare district, such tuition shall be paid by the public welfare district responsible for the child's support and maintenance.

3203. SELECTION OF SCHOOL FOR ATTENDANCE OF CHILDREN WHEN DISTRICT LINE INTERSECTS A DWELLING.

1. The owner of taxable property that is so located that the boundary line between two school districts intersects the dwelling on said property may designate the school in either of such districts to which the children lawfully residing in said dwelling shall attend by filing with the district clerk of each of such districts a notice of such designation on or before August first in any year and thereafter and, until a subsequent designation shall be made and filed, such children shall be deemed to be resident children of the district designated and shall be entitled to the school privileges of such district as resident pupils without the payment of tuition.

2. School taxes on such property shall continue to be levied and collected without reference to the aforesaid designation, but the school authorities of the district that levies and collects a tax upon such property and does not furnish instructional service to the children residing on such property shall pay to the district designated, in which such children are received and instructed, the amount of the tax on such property so levied and collected. If any such district shall fail or refuse on demand to pay the amount of any tax so collected, the school authorities of the district designated and furnishing the instructional service may recover the amount in an action therefor.

3. A designation made as provided in this section shall continue until a new designation is made or until the district superintendent or superintendents having jurisdiction over the districts affected shall otherwise order in a proceeding for the alteration of the boundaries of the district, but no subsequent designation may be made in any school year after August first until the close of that school year.

3204. INSTRUCTION REQUIRED.

1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English, except that for a period of three years from the date of enrollment in school, pupils who, by reason of foreign birth, ancestry or otherwise, experience difficulty in reading and understanding English, may, in the discretion of the board of education, board of trustees or trustee, be instructed in all subjects in their native language and in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

2a. Bilingual instruction in schools. 1. The governing board of any school district is hereby empowered to determine the circumstances and necessity wherein instruction shall be given bilingually. The said governing board shall design the necessary procedures and acquire the necessary training materials and equipment to meet the special educational needs of children of limited English speaking ability through programs designed to accomplish the following:

- a. bilingual education;
- b. to impart to students a knowledge of the history and culture associated with their languages;

- c. to establish closer cooperation between the school and the home;
- d. to provide early childhood educational programs related to the purposes of this section and designed to improve the potential for profitable learning activities by children;
- e. to provide adult education programs related to the purposes of this section, particularly for parents of children participating in bilingual programs;
- f. to provide programs designed for dropouts or potential dropouts having need of bilingual programs;
- g. to provide programs to be conducted by accredited trade, vocational or technical schools; and
- h. to provide other activities deemed desirable to further the purposes of this section.

2. Any duly authorized local educational agency or agencies is hereby empowered to make application for any grant or grants in furtherance of this section under Title VII Public Law 90-247 as enacted by the United States Congress January second, nineteen hundred sixty-eight.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States.

(3) The courses of study beyond the first eight years of full time public day schools may provide a program for a course in "communism and its methods and its destructive effects".

b. For part time day schools. The course of study of a part time public day school shall include such subjects as will enlarge the civic and vocational intelligence and skill of the minors required to attend.

c. For evening schools. In a public evening school instruction shall be given in at least speaking, reading, and writing English.

d. For parental schools. In a parental school provision shall be made for vocational training and for instruction in other subjects appropriate to the minor's age and attainments.

e. Changes in courses of study. The state education department shall have power to alter the subjects of instruction as prescribed in this section.

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

(The 190 days required by this paragraph no longer holds. Section 3604 on which State aid is based was amended in 1958 to provide for a session of 180 days. Through oversight, Section 3204, paragraph 4 was not amended. The intent is to require 180 days of instruction). SEE PAGE 37

b. A part time day school or class shall be in session each year for at least four hours of each week during which the full time day schools are in session.

c. Evening schools shall be in session each year as follows:

(1) In cities having a population of one hundred thousand or more, on at least one hundred nights;

(2) In cities having a population of fifty thousand but less than one hundred thousand, on at least seventy-five nights;

(3) In each other city, and in each school district where twenty or more minors from seventeen to twenty-one years of age are required to attend upon evening instruction, on at least fifty nights.

5. Subject to rules and regulations of the board of regents, a pupil may, consistent with the requirements of public education and public health, be excused for such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporations law.

3205. ATTENDANCE OF MINORS UPON FULL TIME DAY INSTRUCTION.

1. a. In each school district of the state, each minor from six to sixteen years of age shall attend upon full time day instruction.

b. Each minor from six to sixteen years of age on an Indian reservation shall attend upon full time day instruction.

The provisions of paragraphs a and b of this subdivision shall not apply to minors while they are attending kindergarten when they attain the age of six years.

2. Exceptions. a. A minor who has completed a four-year high school course of study shall not be subject to the provisions of part one of this article in respect to required attendance upon instruction.

b. A minor for whom application for a full-time employment certificate has been made and who is eligible therefor may, though unemployed, be permitted to attend part time school not less than twenty hours per week instead of full time school.

3. In each city of the state and in union free school districts having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend upon full time day instruction.

3206. ATTENDANCE OF MINORS UPON PART TIME INSTRUCTION.

1. The board of education of a city or district shall have power to require each employed minor from sixteen to seventeen years of age to attend upon part time instruction in accordance with the provisions of this section.

2. A minor who is a graduate of a four-year high school course of study shall not be required to attend upon part time instruction.

3. The attendance of an employed minor required to attend upon part time instruction by a board of education in accordance with the provisions of this section shall be for not less than four, nor more than eight hours per week, and on such day or days of the week as the school authorities may determine.

4. An employed minor, while temporarily unemployed, or a minor attending part time school under the provisions of subdivision two, paragraph b, of section thirty-two hundred five, required to attend part time instruction by a board of education in accordance with the provisions of this section, shall attend upon part time day instruction for not less than twenty hours a week. An employed minor shall be deemed to be temporarily unemployed until he reenters lawful employment or attends upon full time day instruction.

5. The absence of an employed minor during a rush season may be permitted by the school authorities on condition that the minor attend a greater number of hours per week thereafter until the absence is made up, and provided that the minor's employer is a party to such an agreement.

6. An absence due to unlawful cause may be required to be made up by attendance in excess of the number of hours per week otherwise required.

7. The school authorities of a city or district shall have power after a hearing to establish a half-time system or program of employment and required attendance at part time schools for minors who are included by the provisions of this section.

8. Each minor above the age of sixteen years and under the age of eighteen years, who is not in regular full-time day attendance at a public, private or parochial school or who is regularly and lawfully employed in some occupation or service, unless such minor has completed a four year secondary course of instruction approved by the regents of the university, shall attend a part-time school or class in the city or district in which such minor resides or may be employed, provided the board of education of such city or district has enacted appropriate rules and regulations requiring attendance at such part-time schools under the provisions of section forty-six hundred one. Such attendance shall be subject to the provisions of article ninety-three of this chapter.

3207. ATTENDANCE UPON EVENING INSTRUCTION.

In each city and school district in which evening instruction is provided, under the provisions of part one of this article, each minor from seventeen to twenty-one years of age who is unable to speak, read and write English as required for the completion of the fifth year of the elementary school course of study, and who is not attending upon equivalent day instruction, shall attend upon such evening instruction.

The board of education of the city of New York may reduce the length of recitation periods from forty minutes to thirty-five minutes in evening session in high schools operated by such board.

3208. ATTENDANCE OF MINORS, PROPER MENTAL AND PHYSICAL CONDITION.

1. A minor included by the provisions of part one of this article shall be required to attend upon instruction only if in proper mental and physical condition.

2. A minor whose mental or physical condition is such that his attendance upon instruction under the provisions of part one of this article would endanger the health or safety of himself or of other minors, or who is feeble-minded to the extent that he is unable to benefit from instruction, shall not be permitted to attend.

3. A minor whose mental or physical condition is such that, because of the lack of facilities for his care, transportation and instruction, he is not permitted or required to attend upon instruction, shall be deemed in proper mental and physical condition to attend, if the lacking facilities are provided.

4. If a minor's mental or physical condition, by virtue of which he is not required or permitted to attend upon instruction, is due to physical defects or to a physical condition which may be remedied by the taking of reasonable measures, such mental or physical condition shall justify only the temporary failure of the minor to attend.

5. The determination of a minor's mental or physical condition under the provisions of part one of this article shall be based upon actual examination of the minor made by a person or persons qualified by appropriate training and experience, in accordance with regulations of the state education department. The state education department shall designate persons having the required qualifications to make such mental or physical examinations on behalf of any local school authorities, except that in a city having a population of one million or more the superintendent of schools shall designate such persons.

3209. DUTIES OF PUBLIC WELFARE OFFICIALS WITH RESPECT TO
INDIGENT CHILDREN.

Public welfare officials, except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend upon instruction as hereinbefore required by law.

3210. AMOUNT AND CHARACTER OF REQUIRED ATTENDANCE.

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

e.* Registration of certain private schools. No person or persons, firm or corporation, other than the public school authorities or an established religious group, shall establish or maintain a nursery school and/or kindergarten and/or elementary school giving instruction in the ten common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene and physical training, unless the school is registered under regulations of the commissioner. Upon complying with the said regulations and after payment of a fee of twenty-five dollars a certificate of registration shall be issued by the department which shall be valid for a period of two years from the date of issuance unless suspended or revoked within said period pursuant to said regulations. Such registration may be renewed biennially thereafter upon the payment of a renewal registration fee of twenty-five dollars.

* Paragraph "e" has been declared unconstitutional by the courts.

3211. RECORDS OF ATTENDANCE UPON INSTRUCTION.

1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction, or any other school district employee as may be designated by the commissioner of education under section three thousand twenty-four of this chapter, shall keep an accurate record of the attendance and absence of such minor. Such record shall be in such form as may be prescribed by the commissioner of education.

2. Certificates of attendance to be presumptive evidence. A duly certified transcript of the record of attendance and absence of a child which has been kept, as provided in this section, shall be accepted as presumptive evidence of the attendance of such child in any proceeding brought under the provisions of part one of this article.

3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of the records of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the instruction upon which a minor attends, as provided by part one of this article, shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. He shall give prompt notification in writing

to the school authorities of the city or district of the discharge or transfer of any such minor from attendance upon instruction, stating the date of the discharge, its cause, the name of the minor, his date of birth, his place of residence prior to and following discharge, if such place of residence be known, and the name of the person in parental relation to the minor.

3212. DEFINITION OF PERSONS IN PARENTAL RELATION AND THEIR DUTIES; DUTIES OF CERTAIN MINORS AND OTHER PERSONS.

1. Definition. As used in this article, a person in parental relation to a minor shall include his father or mother, by birth or adoption, his step-father or step-mother, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a minor if he has assumed the charge and care of the minor because the parents or legally appointed guardian of the minor have died, are imprisoned, are insane, or have been committed to an institution, or because, they have abandoned or deserted the minor or are living outside the state or their whereabouts are unknown.

2. Duties of persons in parental relation. Every person in parental relation to a minor included by the provisions of part one of this article:

a. Shall submit at the time such minor begins to attend upon instruction evidence of age as required for the issuance of an employment certificate, or show that such evidence cannot be produced.

b. Shall cause such minor to attend upon instruction as hereinbefore required, and to comply with the provisions of part one of this article with respect to the employment or occupation of minors in any business or service whatever.

c. Shall cause such minor to be placed in proper physical condition to attend upon required instruction, if his physical condition is remediable by the taking of reasonable measures.

d. Shall furnish proof that a minor who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that the minor is not attending.

e. Shall furnish, with respect to a minor from seventeen to twenty-one years of age, on demand of a duly authorized representative of the school authorities, satisfactory proof that he is able to speak, read and write English as required for the completion of the fifth year of the elementary school course of study, or cause such minor to submit to an examination to determine his ability in these respects.

3. Exception. A person in parental relation to a minor included by the foregoing provisions of this section shall not be subject thereto if it can be shown that he is unable to control the minor.

4. Duties of certain minors from sixteen to twenty-one years of age. A minor from sixteen to twenty-one years of age, if not under the control of a person in parental relation, shall comply with such requirements of part one of this article as are applicable.

5. Duties of other persons.

a. No person shall induce a minor to absent himself from attendance upon required instruction or harbor him while he is absent or aid or abet him in violating any provision of part one of this article.

b. No person shall interfere with an attendance officer in the lawful pursuit of his duties, or neglect or refuse to answer his lawful inquiries.

c. No person shall violate any provision of part one of this article in relation to employment of minors, duties of employers, issuance or transfer of any paper authorizing the employment of minors.

d. No person shall make a false oral or written statement in or in relation to any employment certificate or other paper required by part one of this article as to any matter required to appear therein.

f. No person shall present as his own any substitute, altered or transferred certificate or badge.

6. Birth certificates. For the purpose of part one of this article, the board of health upon request shall furnish to the school authorities, or to the person in parental relation to a minor, or to a minor from seventeen to twenty-one years of age, a duly certified transcript of the birth certificate, filed according to law, of a minor from five to twenty-one years of age.

3213. SUPERVISORS OF ATTENDANCE; ATTENDANCE TEACHERS; ATTENDANCE OFFICERS; APPOINTMENT, COMPENSATION, POWERS, AND DUTIES.

1. Appointment, removal, compensation and supervision.

a. To the end that children shall not suffer through unnecessary failure to attend school for any cause whatsoever, it shall be the duty of each attendance teacher and each attendance supervisor to secure for every child his fullest potentialities for education,

physical, social and spiritual growth as an individual and to provide for the school adjustment of any non-attendant child in cooperation with school authorities, special school services and community and social agencies.

The school authorities of each city school district, union free school district, central school district, central high school district, or common school district whose limits include in whole or in part an incorporated village, shall appoint and may remove one or more supervisors of attendance or attendance teachers of such district. A supervisor of attendance shall be appointed in accordance with the civil service law and rules, unless he or she is a licensed attendance teacher or a teacher licensed to teach in New York state, with such further qualifications as the board of regents shall establish. On and after July first, nineteen hundred fifty-five no full-time supervisor of attendance shall be appointed unless he or she holds a license as attendance teacher. Such supervisors of attendance and those holding full-time positions who are similarly licensed teachers or who hold attendance teacher licenses shall be assigned to the step in the salary schedule of the school district commensurate with the salary being paid such supervisors or teachers. Such persons shall be paid thereafter in accordance with such schedule. If the amount of salary received on said July first, nineteen hundred fifty-five is less than the minimum step of the salary schedule, such supervisor or teacher shall be paid until June thirtieth, nineteen hundred fifty-six at the rate of the first step and in accordance with the schedule thereafter.

No supervisor of attendance or attendance teacher shall be appointed who is not twenty-one years of age and in proper physical condition.

In the establishment of an eligible list advanced education related to attendance service shall be taken into consideration in the grading of the candidates. Experience in teaching, in social service and welfare work, and in business or in the professional field shall likewise be taken into consideration.

Paragraph a of subdivision one of this section shall apply to a city in which attendance supervisors are appointed from an eligible list now prepared by a board of examiners.

Supervisors of attendance in a city having a board of examiners shall be licensed as attendance teachers only when they comply with the regulations for such license as established by the commissioner of education and any additional requirements which may be established by the board of examiners.

The board of education shall fix the compensation of part-time supervisors of attendance and prescribe their duties not inconsistent with part one of this article and make rules and regulations for the performance thereof. The superintendent of schools or district superintendent of schools shall supervise the enforcement of part one of this article within such city or school district.

b. The town board of each town, with the approval, in writing, of the district superintendent, shall appoint, on or before August first of each year, one or more attendance officers and shall fix their compensation. During the school year it shall also fill promptly any vacancy after notification thereof by the district superintendent. The district superintendent shall promptly notify the town board of his approval or disapproval of an appointment. If within one month a town board shall not comply with the foregoing provisions, the district superintendent, subject to appeal to the commissioner of education, shall exercise the powers and duties of the town board with respect thereto. An attendance officer appointed for a town shall have jurisdiction over all school districts of the town which are not otherwise provided for by this section. He shall be removable at the pleasure of the district superintendent. His compensation and his necessary expenses in attending conferences called by the district superintendent shall be a town charge.

c. In case a school district shall include territory lying within the boundaries of more than one town, the attendance officer appointed by the town in which the schoolhouse is located shall have jurisdiction over the entire school district.

2. Powers and duties. a. Arrest of truants. A supervisor of attendance, attendance teacher or attendance officer, as the case may be, may arrest without warrant any minor who is unlawfully absent from attendance upon instruction. He shall forthwith place the minor so arrested in attendance upon required instruction and shall notify the parent or guardian of the minor, and he may then begin proceedings for his commitment as a school delinquent or arraign him before a court having jurisdiction. Where a minor resides in one school district and attends school in another school district, the supervisor of attendance, attendance teacher or attendance officer of the district where the minor resides and the supervisor of attendance, attendance teacher or attendance officer of the district where said minor attends school shall have concurrent jurisdiction with reference to said minor and to the person or persons in parental relation to him.

b. Right of entry.

(1) A supervisor of attendance, attendance teacher or attendance officer, as the case may be, in the performance of his duties, may enter during business hours any factory, mercantile or other establishment, or other place in which a minor is believed to be employed, within the city or school district in which he is appointed, and shall be entitled to examine on demand the employment certificates or work permits of minors therein employed, for whose lawful employment such certificates or permits are required by the provisions of part one of this article.

(2) He may also enter any public place during the hours in which the public have access thereto, to ascertain if any minor is therein who is required to attend upon instruction by the provisions of part one of this article, or engaged in a street trade contrary to the provisions of part one of this article, or to collect information required for the school census.

c. Peace officers. Supervisors of attendance, attendance teachers and attendance officers shall be vested with the powers of peace officers for the purpose of carrying out the provisions of part one of this article.

3214. SCHOOL FOR DELINQUENTS.

1. School delinquent. A minor under seventeen years of age, required by any of the provisions of part one of this article to attend upon instruction, who is an habitual truant from such instruction or is irregular in such attendance or insubordinate or disorderly during such attendance, is a school delinquent.

2. Special day schools. The school authorities of any city or school district may establish schools or set apart rooms in public school buildings for the instruction of school delinquents, and fix the number of days per week and the hours per day of required attendance, which shall not be less than is required of minors attending the full time day schools.

3. Parental schools. Such authorities may also establish parental schools for the confinement, maintenance and instruction of school delinquents.

4. Agreements for instruction, confinement and maintenance of school delinquents elsewhere. Such school authorities may also make agreements for the confinement, maintenance and instruction of school delinquents, with any private school, orphans' home, or similar institution controlled by persons of the same religious faith as that of the school delinquent or with the school authorities of another city or district, or with other public agencies.

5. Commitment and parole of a school delinquent. a. Hearing. After reasonable notice to a school delinquent and to the person in parental relation to him and an opportunity for them to be heard, a public school official, as hereinafter provided, may, with the consent in writing of the person in parental relation to the school delinquent, order him to attend a special day school, or to attend upon instruction under confinement at a parental school or elsewhere, as hereinbefore provided, for a period not exceeding two years but in no case after the minor reaches the maximum age of required attendance upon instruction.

b. Official authorized to commit a school delinquent. The following public school officials shall have power to commit a school delinquent as hereinbefore provided:

(1) In a school district having a director of the bureau of compulsory education, school census and child welfare, such director or person authorized by the school authorities to act in his absence or disability; or the superintendent of schools.

(2) Elsewhere, school authorities, superintendents of schools, or district superintendents of schools.

c. Procedure in courts.

(1) If the person in parental relation to a school delinquent refuses to consent in writing to an order that he attend a special day school or a parental school, or upon instruction under confinement elsewhere, such person shall be proceeded against for violating the provisions of section thirty-two hundred twelve of this article.

(2) If the court shall find that the person in parental relation has not violated the provisions of section thirty-two hundred twelve, a proceeding shall be brought against the minor for violation of part one of this article.

d. Parole of a school delinquent. The public school official authorized to commit a school delinquent by the provisions of this section shall have power to parole any school delinquent committed under its provisions.

6. Suspension of a minor. a. The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may suspend the following minors from required attendance upon instruction:

(1) A minor who is insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others;

(2) A minor whose physical or mental condition endangers the health, safety, or morals of himself or of other minors;

(3) A minor who, as determined in accordance with the provisions of part one of this article, is feeble-minded to the extent that he cannot benefit from instruction.

b. The board of education, board of trustees, or sole trustee may adopt by-laws delegating to the principal of the district, or the principal of the school where the pupil attends, the power to suspend a minor for a period not to exceed five school days.

c. No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon

reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil. Such hearing shall be held before the superintendent of schools if the suspension was ordered by him. An appeal to the board of education shall lie from his decision upon such hearing. If the suspension shall have been ordered by the board of education, such hearing shall be before such board.

d. In the case of a suspension by the principal pursuant to paragraph b of this subdivision, the pupil and the person in parental relation to him shall, on request, be given an opportunity for an informal conference with the principal at which the person in parental relation shall be authorized to ask questions of complaining witnesses.

e. Procedure after suspension. In the case of a minor who is suspended as insubordinate or disorderly, immediate steps shall be taken for his commitment as provided in this section, or for his attendance upon instruction elsewhere; in the case of a minor suspended for other cause, the suspension may be revoked whenever it appears to be for the best interest of the school and the minor to do so.

3215. UNLAWFUL EMPLOYMENT.

1. It shall be unlawful, except as otherwise provided by law, to employ in any trade, business or service a minor under the age of eighteen years who does not present an employment certificate, permit or badge issued in accordance with this article.

2. No minor shall be employed during the hours when attendance upon instruction is required by this chapter.

3. No minor shall be employed in violation of any provision of the labor law or other law.

4. Exceptions. a. When attendance upon instruction is not required by this chapter, a minor fourteen years of age or over may be employed without an employment certificate, permit or badge in the following occupations:

1. Caddy service on a golf course;
2. Service as a baby sitter staying with and at the home of another child or children with or without the presence at such home of such child or children's parents or guardians;
3. Casual employment of a minor fourteen or fifteen years of age consisting of yard work and household chores in and about a residence or the premises of a non-profit, non-commercial organization not involving the use of power-driven machinery; and

4. Casual employment of a minor sixteen years of age or over consisting of yard work and household chores in and about a residence or the premises of a non-profit, non-commercial organization, not involving the use of power-driven machinery other than power-driven machinery ordinarily used in such yard work or household chores.

b. When attendance upon instruction is not required, a minor sixteen years of age or over may be employed in work on a farm without an employment certificate, permit or badge.

c. Nothing in this section shall prohibit the employment of a minor during the school lunch period in a school cafeteria at the school which the minor attends if the minor presents an employment certificate issued in accordance with this article.

d. Nothing in this section shall be construed to prohibit the employment of a minor under eighteen years of age in accordance with sections thirty-two hundred twenty-six through and including section thirty-two hundred thirty of this chapter.

e. Nothing in this section shall be construed to prohibit the employment of a minor twelve years of age or over in work for his parents or guardians on the home farm or at other outdoor work not connected with or for any trade, business or service when attendance upon instruction is not required by this chapter.

f. Notwithstanding any other provision of this chapter, an employment certificate, permit, or badge shall not be required for a student sixteen years of age or over who is in attendance at a recognized institution of higher learning and who is employed by a non-profit college or university or by a non-profit college or university fraternity, sorority, student association or faculty association.

g. When attendance upon instruction is not required, in a city having a population of one million or more, a minor fourteen years of age and over may present a certificate of eligibility in lieu of an employment certificate where such employment certificate would otherwise be required. A certificate of eligibility shall entitle the minor to perform the type of work which would be permitted if the minor presented an employment certificate. On a form prescribed by the commissioner, the certificate of eligibility to be issued by the school the minor attends or last attended shall contain:

(a) Evidence of the minor's age as defined in section thirty-two hundred eighteen of this article;

(b) Written consent of the minor's parent or guardian;

(c) A statement of the minor's physical fitness based upon a physical examination made by a board of health physician or the minor's personal physician. If the physician authorized to conduct the foregoing examination shall find that the minor is not physically sound but that in his opinion the minor may safely engage in certain occupations as specified by the commissioner of education, he may issue to the minor a certificate of limited fitness and shall describe therein any physical disability of the minor and shall state the specific occupations in which the minor may engage.

On compliance with the foregoing requirements, the principal of the school the minor attends or last attended, or a teacher deputized by the principal or a supervising official, and during the months of July and August, and at other times in extraordinary circumstances and emergencies, by one or more public school officials deputized in writing by the superintendent of schools or by the district superintendent, shall endorse on the certificate of eligibility the name of the school and the grade or class which the minor is then attending or last attended. The certificate of eligibility shall then be issued to the minor. Employers employing minors pursuant to this paragraph g shall be exempt from the provisions of sections thirty-two hundred twenty-three and thirty-two hundred twenty-four of the education law. Such employers shall keep on file in their office at the place of the minor's employment such certificate of eligibility and shall return such certificate to the minor upon termination of the minor's employment.

3216. EMPLOYMENT CERTIFICATE.

1. A student non-factory employment certificate may be issued to a minor fourteen or fifteen years of age who is attending school. The certificate shall be valid for work in or in connection with a factory except as provided in subdivision four of section one hundred thirty-one of the labor law. The certificate shall expire when the minor reaches the age of sixteen, provided however, that if the minor continues attending school and plans to continue in non-factory employment, the expiration date may be extended by the certificating officer upon the minor's presentation of a new certificate of physical fitness. No such certificate of physical fitness shall be required, however, if the employment certificate had been issued within six months prior to the minor's reaching the age of sixteen years.

2. A student general employment certificate may be issued to a minor sixteen or seventeen years of age who is attending school. It shall be valid for work in or in connection with a factory or any other trade, business or service.

3. A full-time employment certificate may be issued to a minor sixteen or seventeen years of age who is not attending school or who declares his intention to leave school for full-time employment. It shall be valid for work in or in connection with a factory or any other trade, business or service. A full-time employment certificate also may be issued to a minor under eighteen who is a high school graduate, but if such minor is under sixteen years of age the certificate shall not be valid for work in or in connection with a factory except as provided in subdivision four of section one hundred and thirty-one of the labor law.

4. An employment certificate shall be kept on file in the office of the employer and shall be returned to the minor when the employment terminates. An employment certificate shall be valid not only for the initial employment, but also for subsequent employments in work permitted by the particular type of employment certificate.

3216-c. CERTAIN TYPES OF EMPLOYMENT OF CHILDREN PROHIBITED; OTHER AUTHORIZED UPON CONSENT OF LOCAL AUTHORITIES.

In cities having a population of more than a million,

A. It shall be unlawful, except as otherwise provided in this section, to employ, or to exhibit or cause to be exhibited, or to use, or have custody of, for the purpose of exhibition, use or employment, any child under the age of sixteen years, or for one who has the care, custody or control of such child as a parent, relative, guardian, employer or otherwise, to exhibit, use or to procure or consent to the use or exhibition of such child or to neglect or to refuse to restrain such child from engaging or acting in a public or private place, except as hereinafter provided, whether or not an admission fee is charged and whether or not such child or any other person is to be compensated for the use of such child therein,

1. In singing; or dancing; or playing upon a musical instrument; or acting or performing in a theatrical performance or appearing in a pageant; or as a subject for use, in or for, or in connection with, the making of a motion picture film; or,

2. In rehearsing for or performing in a radio or television broadcast or program; or,

3. As a rope or wire walker, gymnast, wrestler, boxer, contortionist, rider upon a horse or other animal (except in a non-professional horse show), or as an acrobat; or upon any bicycle or other mechanical vehicle or contrivance; or,

4. In begging or receiving or soliciting alms in any manner or under any pretense, or in any mendicant occupation; or in gathering or picking rags, or collecting cigar stumps, or collecting bones or refuse from markets or street; or in peddling; or,

5. In any illegal, indecent, or immoral exhibition or practice; or in the exhibition of any such child when insane, idiotic, or when presenting the appearance of any deformity or unnatural physical formation or development; or,

6. In any practice or exhibition or place dangerous or injurious to the life, limb, health or morals of such child is guilty of a misdemeanor.

B. The provision of paragraphs one and two of subdivision A of this section shall not apply to the participation or employment, use or exhibition of any child in a church, academy or school, including a dancing or dramatic school, as a part of the regular services or activities thereof respectively; or in the annual graduation exercises of any such academy or school; or in a private home; or in any place where such performance is under the direction, control or supervision of a board of education; or in the performance of radio or television programs in cases where the child or children broadcasting do so from a school, church, academy, museum, library or other religious, civic, or educational institution; or for not more than two hours a week from the studios of a regularly licensed broadcasting company, where the performance of a child or children is of non-professional character and occurs during hours when attending for instruction is not required in accordance with the education law.

C. Notwithstanding the foregoing provisions of subdivision A hereof, such a child may be employed, used or exhibited in any of the exhibitions, rehearsals or performances set forth in paragraphs one and two of subdivision A hereof to perform with written consent of a parent or guardian of such child and with the written consent of the mayor of the city where such performance or entertainment takes place and upon notice to the Society for the Prevention of Cruelty to Children, if there be one within the city as hereinafter prescribed. Such consent shall not be given unless forty-eight hours' previous notice of the application shall have been served by the applicant for such consent upon the Society for the Prevention of Cruelty to Children, if there be one within the city and a hearing had thereon if requested by such Society within the forty-eight hours' period, and shall be revocable at the will of the authority giving it. Such notice of application shall specify the name of the child, its age, the names and residences of its parents or guardians, the nature, time, duration and number of performances permitted, together with the place and character of the exhibition; and where any child is to be employed in the making of a motion picture film it shall provide that the child is to be employed only in the manner described and set forth in the statement in writing submitted with the application, as hereinafter provided. Any person applying for such consent

for the use or employment of any such child or children in posing or acting for or as a subject to use in or in connection with the making of a motion picture film shall submit with such application a true and accurate statement in writing setting forth and describing in details the entire part to be taken and each and every act and thing to be done and performed, by such child in the making of such film to the mayor of such city and to any such society having jurisdiction in such place.

D. Any violation of this section will be a misdemeanor.

3217. PROCEDURE FOR ISSUANCE OF EMPLOYMENT CERTIFICATES.

1. An application for an employment certificate shall be made by a minor on a form prescribed by the commissioner.

2. Before issuing an employment certificate the issuing officer shall require the minor to submit the following:

- a. Evidence of age;
- b. Written consent of the parent or guardian;
- c. A certificate of physical fitness;
- d. A job description from the initial prospective employer;
- e. If the application is for a full-time employment certificate, a schooling record.

3218. EVIDENCE OF AGE.

1. Evidence showing that the minor is of the required age shall be presented as follows:

- a. A duly certified transcript of a birth certificate filed according to law, or duly certified transcript of a record or baptism, giving the date of birth; or, if not available,
- b. A passport showing the date of birth of the minor; or, if not available,
- c. Other documentary evidence or other recorded evidence in existence two years or more, and satisfactory to the certifying officer, except an affidavit of age.

2. Certificate of age. A minor over eighteen years of age may apply for a certificate of age to the superintendent of schools, the district superintendent, or to the certificating officer. Upon such application a certificate of age, containing the name, date of birth, address and signature of the applicant, shall be issued to him if he furnishes such evidence that he is over eighteen years of age as is required for the issuance of an employment certificate. Such a certificate of age or an employment certificate previously issued for such minor shall be conclusive evidence for an employer that the minor has reached the age certified to therein.

3219. CONSENT OF PARENT OR GUARDIAN.

If the application is for a full-time employment certificate a parent or guardian shall personally appear before the issuing officer or school authorities to indicate consent to the issuance of the application, provided, however, that such personal appearance shall not be required if the applicant is a high school graduate.

3220. CERTIFICATE OF PHYSICAL FITNESS.

1. A certificate of physical fitness shall be issued to a minor, if a thorough physical examination made within three months of his application for an employment certificate shows him to be in sound health and physically qualified for lawful employment. Such certificates shall be issued and such physical examinations shall be made, in a city of over three hundred thousand population, by a physician designated by the board of health, and elsewhere by the medical inspector charged with the duty of making physical examinations of all school children.

2. If the physician authorized to issue certificates of physical fitness shall find that a minor from fourteen to eighteen years of age is not physically sound but that in his opinion the minor may safely engage in certain occupations as specified by the regulations of the commissioner of education he may issue to the minor a certificate of limited physical fitness and shall describe therein the physical disability of the minor and shall state the specific occupations in which the minor may engage. An employment certificate issued to a minor from fourteen to eighteen years of age who has presented a certificate of limited physical fitness shall be valid for not more than six months from the date of its issuance and shall bear on the face of the certificate the date of its expiration and the particular occupations to which the employment of the minor is limited.

3. A record made of the physical examination shall show whether a certificate of physical fitness has been issued or withheld. Such record shall be sent to the certificating officer.

4. A certificate of physical fitness issued in another state to a minor seeking employment in this state may be accepted in lieu of the certificate of physical fitness required by subdivision one of this section, provided the standards for issuing such certificates in the other state are deemed substantially equivalent to those of this state in accordance with regulations adopted by the commissioner of education.

3221. JOB DESCRIPTION.

The job description shall be signed by the initial prospective employer or his authorized representative and shall show his name and place of business, the minor's name, the number of days per week and the number of hours per day and per week during which he will be employed, the hours of the beginning and the ending of work, and the nature and type of the employment.

3222. SCHOOLING RECORD.

1. By whom issued. Such record shall be issued by the principal of the school the minor attends or formerly attended, or by a teacher deputized by the principal or by a supervising official, and during the months of July and August, and at other times in extraordinary circumstances and emergencies, by one or more public school officials deputized in writing by the superintendent of schools or by the district superintendent of schools.

2. Procedure. On application of the person in parental relation, a schooling record shall be issued promptly to a minor who complies with the following conditions:

- a. Presents a certificate of physical fitness. Upon receipt of an application for a schooling record the person authorized to issue such record shall request that an examination be made of the minor for a certificate of physical fitness in accordance with the requirements hereon prescribed.
- b. Meets the specified age requirement.

3. Such schooling record shall show, when practicable, the school and grade of class which the minor is then attending.

3223. DUTIES OF EMPLOYERS.

The employer of any minor required to have an employment certificate:

1. Shall before employment begins, file in his office at the place of the minor's employment such certificate so that it may be readily accessible to any person authorized by law to examine such document.

2. Shall satisfy himself that the minor presenting such certificate is in fact the minor named therein by requiring such minor to sign his name on such document.

3. Shall mail at once to the certificating officer the notice of the beginning of the minor's employment which is attached to the certificate and such notice shall also contain information on the nature of the job. The employer also shall enter on the certificate the name and address of the employer and the dates of the beginning and termination of the minor's employment. Upon termination of the minor's employment, the employer shall return the employment certificate to the minor.

4. Shall discontinue the services of a minor required by the provisions of part one of this article to attend upon part time instruction, upon receipt of written notice from the school authorities of the failure of such minor to attend as thus required.

3224. TEMPORARY SERVICES.

a. If an employer is engaged in a business of assigning employees for temporary services at another establishment, and the employer compensates the employee for such services rendered the employer shall keep on file in his office the employment certificate and shall cause to be delivered to each establishment where the child will perform his services a true copy of such employment certificate. Such delivery shall be deemed compliance with sections thirty-two hundred sixteen and thirty-two hundred twenty-three of this chapter. The owner of each establishment to which the child is assigned shall keep on file in his office such copy of the employment certificate, which shall be deemed compliance with sections thirty-two hundred sixteen and thirty-two hundred twenty-three of this chapter, and shall return such copy to the employer at the conclusion of the child's assignment. Such employer shall

note on the original employment certificate the existence of each copy.

b. As used in this section, the term "establishment" includes a factory, mercantile establishment, business office, restaurant, hotel and any other trade, business or service.

c. The commissioner of education may promulgate rules and regulations as he deems necessary to insure that employment under the provisions of this section shall not be harmful or undesirable from the point of view of the welfare, development, or proper education of the child.

3225. SPECIAL EMPLOYMENT CERTIFICATE.

1. A special employment certificate may be issued to a minor fifteen years of age, found to be incapable of profiting by further instruction available upon compliance with the same requirements as in the case of a full-time employment certificate except that a schooling record shall not be required.

2. The fact that a minor is incapable of profiting from further instruction available shall be determined in such manner as may be specified in the regulations of the commissioner of education.

3. A special employment certificate shall not authorize the employment of a minor in or in connection with or for a factory.

3226. FARM WORK PERMITS.

1. A farm work permit may be issued to a minor fourteen or fifteen years of age authorizing employment in farm service.

2. A farm work permit also may be issued to a minor over twelve years of age for employment in assisting in the hand work harvest of berries, fruits and vegetables pursuant to paragraph e of subdivision two of section one hundred thirty of the labor law.

3. To obtain a farm work permit a minor shall present to the issuing officer the following:

- a. Evidence of age;
- b. Written consent of the parent or guardian; and
- c. A certificate of physical fitness

4. Such permit shall be valid only when signed by the employer and subject only to the condition that it shall not be valid for work in or in connection with a factory.

5. A farm work permit shall not be required for the employment of a minor sixteen years of age or over in farm service.

3227. STREET TRADES; DEFINITION AND GENERAL REGULATIONS.

1. Definition. A street trade for the purposes of part one of this article shall include the carrying, selling, exposing or offering for sale of newspapers or periodicals, and work as a bootblack, by a minor within the ages specified in this section, but shall not include the occupation engaged in by a newspaper carrier boy as defined in subdivision one of section thirty-two hundred nineteen-a of this chapter.

2. Application. The provisions of this section shall apply to all school districts.

3. No boy under fourteen and no girl under eighteen years of age shall be engaged in a street trade; and no boy from fourteen to eighteen years of age shall be so engaged unless a street trades badge or certificate has been lawfully issued to him.

4. A street trades badge or certificate shall be issued by the school authority upon an application signed by the minor and the parent or guardian of the minor. There shall be attached and made a part of said application evidence of required age by a duly certified transcript of a birth certificate, record of baptism or passport of such other evidence of age as shall satisfy the issuing authority. The school authority, before issuing the badge or certificate, shall require a statement from a physician designated by the board of health in cities of over three hundred thousand population and elsewhere from the school physician showing that the minor is in sound health and physically qualified to engage in a street trade. The annual physical examination required by article nineteen of this chapter may serve as the required examination hereunder and shall determine the continuance of the badge or certificate from year to year, provided that further examinations may be made by the examining physician for this purpose as circumstances may require.

5. A boy to whom a street trades badge or certificate has been issued shall carry it on his person while engaged in a street trade. Such a badge or certificate shall not be transferred to another boy or used by another if transferred.

6. No boy shall be engaged in a street trade before six o'clock in the morning nor after seven o'clock in the evening, nor during the time he is required to attend upon instruction, nor more than four hours in any one day when school is in session, nor more than five hours in any one day when school is not in session.

7. The police shall enforce the provisions of this section except with respect to the issuance and revocation of street trades badges or certificates. The industrial commissioner shall have concurrent power to enforce this section except with respect to the issuance and revocation of street trades badges or certificates.

8. The school authorities may revoke the badge or certificate for cause after due notice.

3228. NEWSPAPER CARRIER BOY.

1. Definition. A "newspaper carrier boy" is a male minor between the ages of twelve and eighteen years of age who engages in the occupation of delivering or selling and delivering newspapers or periodicals to customers at their homes or places of business.

2. A "newspaper carrier boy" shall possess a newspaper carrier boy certificate or badge issued by the school authorities of the school district in which he resides and shall carry it upon his person when engaged in the occupation of delivering or selling and delivering newspapers or periodicals to homes or places of business.

3. A newspaper carrier boy certificate or badge shall be issued by the school authorities of the school district in which the boy resides and upon an application signed by the minor and the parent or guardian of the minor. There shall be attached to, and made a part of, such application, evidence of required age by a duly certified transcript of a birth certificate, record of baptism, passport or such other evidence of age as shall satisfy the issuing authority.

The issuing authority, before issuing the certificate or badge, shall require a statement from a physician designated by the board of health in cities of over three hundred thousand population and elsewhere from the school physician showing that the minor is physically qualified to engage in the occupation of delivering or selling and delivering newspapers or periodicals to homes or places of business. The annual physical examination required by article nineteen of this chapter may serve as the required examination hereunder and shall determine the continuance of the certificate or badge from year to year, provided that further examinations may be made by the examining physician for this purpose as circumstances may require.

4. No newspaper carrier boy shall be engaged in delivering or selling and delivering newspapers or periodicals before six o'clock in the morning nor after seven o'clock in the evening, nor during the time he is required to attend upon instruction, nor for more than four hours in any one day when school is in session, nor more than five hours in any one day when school is not in session.

5. No male minor under twelve years of age may engage in the occupation of delivering or selling and delivering newspapers or periodicals to customers at their homes or places of business.

6. The school authorities may revoke the certificate or badge for cause after due notice.

7. Enforcement. The police shall enforce the provisions of this section except with respect to the issuance and revocation of street trades badges or certificates. The industrial commissioner shall have concurrent power to enforce this section except with respect to the issuance and revocation of street trades badges or certificates.

8. It shall be unlawful for any person or corporation to wilfully and knowingly deliver or cause to be delivered newspapers or periodicals to a newspaper carrier boy who is not in compliance with the provisions of this section.

3229. CERTAIN TYPES OF EMPLOYMENT OF CHILDREN PROHIBITED; OTHERS AUTHORIZED UPON CONSENT OF LOCAL EDUCATIONAL AUTHORITIES.

In cities having a population of less than one million or in any school district.

1. It shall be unlawful, except as otherwise provided in this section, to employ, or to exhibit or cause to be exhibited, or to use, or have custody of, for the purpose of exhibition, use or employment, any child under the age of sixteen years, or for one who has the care, custody or control of such child as a parent, relative, guardian, employer or otherwise, to exhibit, use or to procure or consent to the use or exhibition of such child, or to neglect or to refuse to restrain such child from engaging or acting in a public or private place, except as hereinafter provided, whether or not an admission fee is charged and whether or not such child or any other person is to be compensated for the use of such child herein.

- a. In singing; or dancing; or playing upon a musical instrument; or acting or performing in a theatrical performance or appearing in a pageant; or as a subject for use, in or for, or in connection with, the making of a motion picture film; or,

- b. In rehearsing for or performing in a radio or television broadcast or program.

2. The provisions of subdivision one of this section shall not apply to the participation or employment, use or exhibition of any child in a church, academy or school, including a dancing or dramatic school, as a part of the regular services or activities thereof respectively; or in the annual graduation exercises of any such academy or school; or in a private home; or in any place where such performance is under the direction, control or supervision of a board of education, trustee or trustees; or in the performance of radio or television programs in cases where the child or children broadcasting do so from a school, church, academy, museum, library or other religious, civic or educational institution; or for not more than two hours a week from the studios of a regularly licensed broadcasting company, where the performance of the child or children is of a nonprofessional character and occurs during hours when attendance for instruction is not required in accordance with the education law.

3. Notwithstanding the foregoing provisions of subdivision one hereof, such a child may be employed, used or exhibited in any of the exhibitions, rehearsals or performances set forth in subdivision one hereof to perform with the written consent of the board of education, trustee or trustees, where such exhibition, rehearsal or performance takes place, or of the public school official thereof to whom authority to grant such consent may be delegated by such educational authority, such consent to be granted in the manner hereinafter set forth by such educational authority or its delegated official, when in the discretion of such educational authority or such delegated official, such employment, use or exhibition of such child will not in the judgment of such educational authority or official, be harmful or undesirable from the point of view of the welfare, development or proper education of such child. Such consent shall not be given unless forty-eight hours' previous notice of the application shall have been served in writing by the applicant for such consent upon the society for the prevention of cruelty to children or other child protective organization, if there be one within the city or school district, as the case may be, and a hearing had thereon if requested by such society or organization within such forty-eight hour period. The duration and extent of consents relating to paragraph b of subdivision one shall be subject to regulations adopted by the authority issuing the same.

4. Application in writing for such consent shall be delivered to the licensing authority by the applicant for such consent at least seventy-two hours prior to the proposed performance, and shall specify the true and stage names of the child, the place and date of its birth, the names and residences of its parents or guardians, the nature, time, duration and number of performances for which permission is sought and the place and character of the proposed exhibition, and, except when the application relates to participation in the performance of a radio or television program or programs, a true and accurate statement in writing setting forth and describing in

detail the entire part to be taken and each and every act and thing to be done and performed by such child, or, when the application relates to participation in the performance of a radio or television program or programs, a general statement describing the part or parts to be taken by such child or the nature of the radio or television series in which such child is to perform. Such application shall be acted upon forthwith, and in no event be delayed in excess of sixty hours after the receipt thereof.

5. The board of education, trustee or trustees may designate in writing one or more public school officials to issue such consents for it and in its name in accordance with regulations to be issued by the commissioner of education.

6. The board of education, trustee or trustees or any public school official designated to issue such consents are hereby authorized to revoke such consents upon the violation of any provisions of this section or of the prescribed rules and regulations regulating the issuance of such consents.

7. The commissioner of education shall have power, subject to the approval thereof by the board of regents, to adopt and prescribe rules and regulations and amendments and repeals thereof relating to whom such power shall be delegated, and the manner of such delegation, and the forms of applications and consents to be used by said local authorities, which rules and regulations shall be so designed that such employment or exhibition of such child shall not be allowed when the same is harmful or undesirable from the point of view of the welfare development or proper education of such child.

8. Any violation of this section shall be a misdemeanor.

3230. EMPLOYMENT OF CHILDREN AS MODELS.

1. It shall be unlawful to employ, use, exhibit or cause to be exhibited a minor under eighteen years of age as a model unless:

- a. a child model work permit has been issued as hereinafter provided; and
- b. such employment, use or exhibition is in accordance with the rules and regulations promulgated by the commissioner of education as hereinafter provided.

2. It shall be unlawful for any parent or guardian of a minor under eighteen years of age to obtain or consent to the employment or exhibition of such minor as a model unless a permit has been issued in accordance with this section.

3. An application for a permit for the employment or exhibition of a minor under eighteen years of age as a model shall be made by such minor or by his parent or guardian on a form prescribed by the commissioner of education and shall contain such matters as the commissioner may determine to be necessary, including the following:

- a. the minor's name, address, date of birth, and if the minor is of school age, the name and address of the school the minor attends and, if the application is made by his parent or guardian of a minor over twelve years of age the consent of such minor;
- b. the name and address of the parent or guardian, and the consent of the parent or guardian to the issuance of the permit;
- c. a certificate from a physician showing that the minor is physically fit to be employed or exhibited as a model. In a city of over one million population such certificate shall be issued by a physician designated by the department of health if the minor is of school age.

4. A child model work permit shall be issued upon application to the superintendent of schools in cities and school districts employing a superintendent of schools and elsewhere upon application to the district superintendent of schools. A superintendent of schools or districts superintendent of schools may, in accordance with regulations of the commissioner of education, designate in writing one or more public school officials to act as certificating officer in his stead.

5. A child model work permit may be issued by the certificating officer if he finds that the employment or exhibition of the minor as a model will not be harmful to his health and welfare, and that, in the case of a minor of school age, the minor's education will not be neglected.

6. A child model work permit:

- a. shall be signed by each person employing, using, or exhibiting the minor prior to the commencement of the minor's employment or exhibition and shall permit the employment, use or exhibition of such minor only when signed by such person;
- b. shall not be valid when attendance for instruction is required in accordance with the education law;
- c. shall terminate one year after the date of issuance;
- d. may be revoked by the certificating officer at any time for good cause.

7. The commissioner of education may promulgate rules and regulations to carry out the provisions of this section. Such rules and regulations shall be designed to protect the health and welfare of child models and to insure that the conditions under which such child models are employed, used or exhibited will not impair their health or welfare.

8. This section shall not apply to the employment, use, or exhibition of a minor under eighteen years of age as a model:

- a. in a television broadcast or program for whom a permit has been issued pursuant to section thirty-two hundred twenty-nine or section thirty-two hundred sixteen-c of this chapter.
- b. by a federal, state or municipal government or political subdivision or agency thereof, or by any corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

9. Violation of this section shall be a misdemeanor.

3231. GENERAL PROVISIONS.

1. **Certificating officers.** Employment certificates, permits and badges shall be issued by the superintendent of schools in cities and school districts employing a superintendent of schools, and elsewhere by the district superintendent of schools. A superintendent of schools, or district superintendent of schools may designate in writing one or more public school officials to act as certifying officers in his stead.

2. **Revocation.** Employment certificates, permits and badges may be revoked for cause by the superintendent of schools or the district superintendent of schools within their respective jurisdictions.

3. **Approval of form and contents.** The commissioner of education shall prescribe or approve the form and contents of all certificates, permits, badges, physical examination records, and schooling records required by part one of this article. The form of such certificates, permits and badges shall also be subject to the approval of the industrial commissioner.

3232. COURTS HAVING JURISDICTION.

1. Courts of special sessions and magistrates' courts shall have concurrent jurisdiction with family courts to hear, try and determine charges of violation of the provisions of part one of this article, within their respective jurisdictions. In the counties of Cortland and Westchester and in the city of New York children's courts shall have exclusive original jurisdiction in such proceedings. Notwithstanding other provisions of law, children's courts shall have jurisdiction, for the purposes of part one of this article, of minors under the age of eighteen.

2. A prosecution instituted under the provisions of part one of this article shall be deemed a bar to a prosecution under the labor law based on the same state of facts.

3233. PENALTIES.

Except as otherwise provided, a violation of part one of this article shall be punishable for the first offense by a fine not exceeding ten dollars or ten days' imprisonment; for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment.

A violation of sections thirty-two hundred fifteen, thirty-two hundred twenty-three and thirty-two hundred twenty-four of this article shall be punishable for a first offense by a fine of not less than twenty nor more than fifty dollars; for a second offense by a fine of not less than fifty nor more than two hundred fifty dollars, or by imprisonment for not more than thirty days or by both such fine and imprisonment; for a third offense by a fine of not less than two hundred fifty dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment.

Any person who knowingly makes a false statement in or in relation to any application made for an employment certificate as to any matter required by this chapter to appear in any affidavit, record, transcript or certificate therein provided for, is guilty of a misdemeanor and upon conviction shall be punished, except as in this chapter or in the penal law otherwise provided, for a first offense by a fine of not more than one hundred dollars; for a second offense by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for a subsequent offense by a fine of not less than three hundred dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment.

3234. ENFORCEMENT; WITHHOLDING STATE MONEYS BY COMMISSIONERS OF EDUCATION.

1. The commissioner of education shall supervise the enforcement of part one of this article and he may withhold one-half of all public school moneys from any city or district, which, in his judgment, willfully omits and refuses to enforce the provisions of part one of this article, after due notice, so often and so long as such wilful omission and refusal shall, in his judgment, occur, or continue.

2. If the provisions of part one of this article are complied with at any time within one year from the date on which said moneys were withheld, the money so withheld shall be paid over by said commissioner of education to such district or city, otherwise forfeited to the state.

3240. SCHOOL CENSUS IN THE CITIES OF NEW YORK, BUFFALO AND ROCHESTER.

In the cities of New York, Buffalo and Rochester provision shall be made by the board of education for taking a school census in connection with the work of enforcing part one of this article.

3241. SCHOOL CENSUS IN CITIES.

1. The board of education of each city, except in cities having a population of one hundred twenty-five thousand or more, shall constitute a permanent census board in such city. Such board shall, under its regulations, cause a census of the children in its city to be taken and to be amended from day to day, as changes of residence shall occur among persons in such cities within the ages prescribed in subdivision two of this section and as other persons shall come within the ages prescribed therein and as other persons within such ages shall become residents of such cities, so that there shall always be on file with such board a complete census giving the facts and information required in subdivision two of this section.

2. Such census shall include all persons between birth and eighteen years of age and in the case of physically or mentally handicapped children between birth and twenty-one years of age, their names, their respective residences by street and number, the day of the month and the year of their birth, the names of the persons in parental relation to them, such information relating

to physical or mental defects, to illiteracy, to employment and to the enforcement of the law relating to child labor and compulsory education as the education department and the board of education of each such city shall require and also such further information as such board of education shall require.

3. Such board shall report, by name, age and address, to the education department, those children who are blind or deaf and those having serious physical or mental defects.

4. It shall be the duty of persons in parental relation to any person between such ages residing within the limits of any such city to make such reports as the board of education of such city shall require. Such reports shall contain the following information:

- a. Two weeks before any child shall become of the compulsory school age, the name of such child, its residence, the name of the person or persons in parental relation thereto, and the name and location of the school to which such child shall have been or shall be sent as a pupil.
- b. In case a child of compulsory school age shall, for any cause, be removed from one school and sent to another school, or sent to work in accordance with the labor law, all the facts in relation thereto.
- c. In case the residence of a child shall be removed from one police precinct to another police precinct, the new residence and the other facts required in paragraphs a and b of this subdivision.
- d. In case a child between birth and eighteen years of age shall become a resident of such city for the first time, the name, residence and such other facts as the board of education shall require.

3242. SCHOOL CENSUS IN SCHOOL DISTRICTS.

The trustee or board of education of every school district shall annually on the thirtieth day of August cause a census to be taken of all children between birth and eighteen years of age, including all such facts and information as are required in the census provided for in section thirty-two hundred forty-one of this chapter. Such census shall be taken in duplicate in their respective school districts, and one copy thereof filed with the

teacher or principal on the first day of school and the other copy filed with the district superintendent or superintendent on or before the fifteenth day of September. Such census shall include the reports and information required from cities as provided in section thirty-two hundred forty-one. All information regarding a mentally handicapped minor shall be filed with the superintendent of the intermediate school district or board of co-operative educational services of which said district may be a part.

3243. PENALTY FOR WITHHOLDING INFORMATION.

A parent, guardian or other person having under his control or charge of a child between birth and eighteen years of age who withholds or refuses to give information in his possession relating to such child and required under part two of this article, or any such parent, guardian or other person who gives false information in relation thereto, shall be liable to and punished by a fine not exceeding twenty dollars or by imprisonment not exceeding thirty days.

(3604.)

7. No district shall be entitled to any portion of such school moneys on such apportionment unless the report of the trustees or board of education for the preceding school year shall show that the public schools were actually in session in the district and taught by a qualified teacher or by successive qualified teachers or by qualified teachers for not less than one hundred eighty days. The apportionment based on the average daily attendance, the weighted average daily attendance of a district or the approved expenditures of the district, as the case may be, shall be reduced by one-hundred eightieth thereof for each day less than one hundred eighty days that the schools of the district were actually in session, except that the commissioner may disregard such reduction, up to five days, in the apportionment of public money, if he finds that the schools of the district were not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel, or the destruction of a school building, and if, further, the commissioner finds that such district cannot make up such days of instruction during the school year.

8. No school shall be in session on a Saturday or a legal holiday, except general election day, Washington's birthday and Lincoln's birthday, and except that driver education classes may be conducted on a Saturday. A deficiency not exceeding six days during any school year caused by teachers' attendance upon teachers' conferences held by district superintendents of schools within a county and upon meetings of the New York State Teachers' Association, shall be excused by the commissioner of education. Similarly, a deficiency not exceeding three days during any school year caused by teachers' attendance upon conferences held by superintendents of schools of city school districts or other school districts employing superintendents of schools shall be excused by the commissioner.

COMMISSIONERS REGULATIONS

TEACHERS CERTIFICATE

80.29 Attendance teacher

(a) Permanent certificate

(1) Preparation. The candidate shall have completed a 4-year curriculum leading to the baccalaureate degree (or approved equivalent preparation). In addition the candidate shall have completed 30 semester hours in approved undergraduate or graduate courses. These courses shall include the organization and co-ordination of pupil personnel services, community organization, counseling techniques or casework, child growth and development, education, education law, and supervised fieldwork and practice in attendance procedures in public schools.

(2) Experience. The candidate shall have completed 2 years' experience in teaching and/or social work or equivalent experience in fields related to attendance.

(b) Provisional certificate

(1) Preparation. The candidate shall have completed the 4-year curriculum leading to the baccalaureate degree (or approved equivalent preparation). In addition the candidate shall have completed 12 semester hours in approved undergraduate or graduate courses. The courses shall be selected from courses in organization and co-ordination of pupil personnel services, community organization, counseling techniques or casework, child growth and development, education, education law, and supervised fieldwork and practice in attendance procedures in public schools.

(2) Time validity. The provisional certificate shall be valid for 5 years.

(c) Provisional certificate under waiver

(1) Experience. The candidate shall have completed 3 years of satisfactory service in attendance work in the public schools of the State of New York prior to the effective date of these regulations and be recommended for the provisional certificate under waiver by his superintendent of schools.

(2) Preparation. The candidate shall have completed 30 semester hours in approved courses prior to the issuance of the permanent certificate but shall not necessarily have completed the baccalaureate degree.

(3) Time validity. The provisional certificate under waiver shall be valid for 5 years.

EXEMPTIONS FROM ATTENDANCE

101.1 Definitions

The following shall be qualified examiners for the purpose of this article:

(a) For making examinations for physical disability, school physicians, and other physicians qualified to practice in New York State;

(b) For making examinations for severe mental retardation, or mental or emotional disorder;

(1) Psychiatrists certified by the Department of Mental Hygiene;

(2) Psychologists certified by the Department of Mental Hygiene, or school psychologists holding certificates issued by the State Education Department, or other psychologists certified by such department;

(3) State-operated mental health clinics, or mental health clinics licensed by the New York State Department of Mental Hygiene.

101.2 Exemption from attendance

Minors between the ages of 6 and 16 years are required to attend upon instruction unless exempted from such attendance in accordance with the following regulations:

(a) The sole trustee, the board of trustees, or the board of education of any school district may cause a minor between the ages of 5 and 21 years, who is in attendance or who is required to be in attendance, to be examined by qualified physicians, psychiatrists, or psychologists as hereinafter provided and may, upon their written recommendation, which shall be kept on file, exempt or exclude such minors from attendance for such period as the recommendation may determine, upon approval of the State Education Department.

101.3 Certificate of exemption

1. Certificates of exemption shall be issued because of:

- a. Physical disability; or
- b. Severe mental retardation; or
- c. Mental or emotional disorders.

101.4 Examination and recommendation

(a) Examination and recommendation for exemption shall be made by the persons enumerated in section 101.1 as follows:

(1) Physical disability

(i) For exemption because of physical disability for a period of not less than 3 months but not to exceed 1 year, such examination shall be made by two physicians, one of whom shall be the school physician. Such exemptions, in accordance with the best judgment of the examining physicians and the special circumstances of the case, may be recommended initially for a 3-month, 6-month, 9-month, or 12-month period.

(ii) Renewal of an exemption, because of physical disability, beyond the designated 3-, 6-, 9-, or 12-month period for physical disability shall be upon written recommendation after a thorough examination, by two physicians, one of whom shall be the school physician.

(2) Severe mental retardation

(i) For exemption of those children who because of severe mental retardation or deficiency are unable to benefit from instruction for a period of not less than 6 months but not to exceed 2 years, such examination shall be made by a qualified psychologist, or by a qualified psychologist and a qualified psychiatrist, or by an approved clinic, but in any case the study shall include a careful physical examination by the school physician and any physical handicaps shall be noted.

(ii) Renewal of an exemption of those children who because of severe mental retardation or deficiency are unable to benefit from instruction beyond the period of the original exemption shall be upon the written recommendation of a qualified psychologist, or by a qualified psychologist and a qualified psychiatrist, or by an approved clinic, after a thorough examination, which shall follow the general pattern of the examination made for the original exemption. Further examinations shall be made prior to the termination of the original exemption period or subsequent to the termination thereof upon the recommendation of the examiner, if in his judgment such re-examination is desirable. An exemption,

because of mental disability, will be accepted as permanent if, at the end of 2 years and examination, following the pattern of the original examination, indicates the condition to be permanent and a written recommendation for a permanent exemption is made by the examiner. Exemptions will not become permanent until the written recommendation made by the examiner is approved by the Education Department. When approved, certification of all permanent exemptions shall be kept in an active file as long as the exempted minors are within the compulsory school age limits and may be subject to review in any instance where exceptional circumstances would seem to justify such review.

(3) Mental or emotional disorder

(i) For exemption because of a mental or emotional disorder for a period of not to exceed 6 months, such examination shall be made by a qualified psychiatrist and a qualified psychologist or by an approved clinic. In any case, the study shall include a careful physical examination by the school physician and any physical handicaps shall be noted.

(ii) Renewal of an exemption because of a mental or emotional disorder beyond the period of the original exemption shall be upon the written recommendation after a thorough examination by a qualified psychiatrist and a qualified psychologist or by an approved clinic, and shall be followed by periodic examinations as necessary in the judgment of the examining psychiatrist or clinic. Said written recommendation shall include a summary, by the psychiatrist or the clinic, of the child's mental status.

101.5 Notices

1. Notice of the exemption or exclusion of any minor between 5 and 21 years of age shall be sent to the Bureau of School Social Services within 10 days of the issuance of exemption certificate. A similar notice shall be sent to the parent or guardian.

101.6 Transfers

1. If a presently exempted child moves to another school district, copies of the exemption forms shall be sent to the superintendent of the receiving district and the Bureau of School Social Services shall be notified.

101.7 Pupil attendance record-keeping

(a) Definitions

When used in this section, the following terms shall have the respective meanings hereinafter set forth or indicated:

(1) Pupil. A child enrolled in any public school in the State of New York.

(2) Register of attendance. Any book, card, or other form used to keep a record or list or account of attendance, absence and tardiness of a pupil, the form of which shall have been approved by the Commissioner of Education.

(3) Teacher. A member of the teaching and supervisory staff of a school district of the State.

(4) Employee other than a teacher. A suitable person other than a teacher employed by a school district of the State in a position appropriate for the keeping of records.

b. The record of each pupil's attendance, absence, and tardiness shall be kept by each school district in a register of attendance in a manner approved by the Commissioner of Education.

c. The register of attendance shall set forth at least the following for each pupil:

- (1) name;
- (2) date of birth;
- (3) full names of parents or guardians;
- (4) address.

d. All entries in a register of attendance shall be made either by a teacher or by an employee other than a teacher designated by the board of education.

e. The board of education shall designate a teacher to supervise the keeping of the register of attendance where an employee other than a teacher is designated by the board of education as the person to make entries in the register of attendance.

f. The entries in the register of attendance shall be verified by the oath of affirmation of the person making the entries in the register of attendance.

RELIGIOUS OBSERVANCE AND EDUCATION

109.2 Absence from school

(a) Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

(b) The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

(c) Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

(d) Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

(e) Such absence shall be for not more than 1 hour each week at the close of either the morning or afternoon session or both at a time to be fixed by the local school authorities, provided that the time designated for each separate unit, the primary grades (K-3), intermediate grades (4-6), junior high school grades (7-9), and senior high school grades (10-12) shall be the same for all pupils in that unit in each separate school.

(f) In the event that more than one school for religious observance and education is maintained in any district, the hours for absence in each particular public elementary or secondary school unit in such district shall be the same for all such religious schools.

CONSENT FOR THE EMPLOYMENT OF CHILDREN AS ENTERTAINERS AND IN EXHIBITIONS

190.1 Issuance of consents

(a) The school authorities may designate the superintendent of schools or district superintendent of schools to issue consents or permits for child performances. The issuing authority shall be guided by the provisions of section 3229 of the Education Law.

(b) Applications for consents shall be duplicate:

(1) One copy shall be filed with the issuing authority;

(2) The other copy shall be sent to the society for the prevention of cruelty to children or other child protective organization in the area.

(c) Consents may be issued only when an examination by the school medical officer shows the minor to be in proper physical condition for the performance. An examination shall be required for each consent issued.

(d) The tenure of each consent shall be for 6 months but shall become invalid and a new consent shall be required if the performance changes materially in character.

(e) A consent shall be revoked by the issuing authority upon evidence that the statutory requirements or the provisions of these regulations have been violated.

(f) A report of all permits issued or revoked shall be immediately forwarded to the Commissioner of Education.

190.2 Employment or exhibition of children as models

(a) A minor employed, used, exhibited, or caused to be exhibited as a model shall be accompanied by the parent or guardian of such minor or by an adult designated in writing by such parent or guardian provided that in relation to a minor 15 years of age or under the employer of the minor may not be so designated by the parent or guardian.

(b) No minor shall be employed, used, exhibited, or caused to be exhibited as a model during the hours he is required to be in attendance in the school in which he is enrolled.

(c) (1) No minor under 7 years of age shall be employed, used, exhibited, or caused to be exhibited as a model for more than 2 hours in any 1 day and not more than 10 hours in any 1 week nor shall such minor be so employed, used, exhibited, or caused to be exhibited during the hours of 6 p.m. to 9 a.m.

(2) (i) No minor 7 years of age through 13 years of age, in any week during which the school said minor attends is in session, shall be employed, used, exhibited, or caused to be exhibited as a model more than 3 hours in any 1 day in which such school is in session or 4 hours in any 1 day in which such school is not in session but not more than 18 hours in any such week.

(ii) No minor 7 years of age through 13 years of age, in any week during which the school said minor attends is not in session, shall be employed, used, exhibited, or caused to be exhibited as a model more than 4 hours in any 1 day but not more than 20 hours in any such week.

(iii) No such minor shall be employed, used, exhibited, or caused to be exhibited between the hours of 6 p.m. and 9 a.m.

(3) (i) No minor 14 or 15 years of age, in any week during which the school said minor attends is in session, shall be employed, used, exhibited, or caused to be exhibited as a model more than 3 hours in any 1 day in which such school is in session or 8 hours in any 1 day in which such school is not in session, but not more than 23 hours in any such week.

(ii) No minor 14 or 15 years of age, in any week during which the school said minor attends is not in session, shall be employed, used, exhibited, or caused to be exhibited as a model more than 8 hours in any 1 day but not more than 40 hours in any such week.

(iii) No such minor shall be employed, used, exhibited, or caused to be exhibited between the hours of 6 p.m. and 9 a.m.

(4) (i) No minor 16 or 17 years of age, in any week during which the school said minor attends is in session, shall be employed, used, exhibited, or caused to be exhibited as a model more than 4 hours in any 1 day in which such school is in session or 8 hours of any 1 day in which such school is not in session but not more than 28 hours in any such week.

(ii) No minor 16 or 17 years of age, in any week during which the school said minor attends is not in session, shall be employed, used, exhibited, or caused to be exhibited as a model more than 8 hours of any 1 day but not more than 48 hours in any such week.

(iii) No male minor 16 or 17 years of age shall be employed, used, exhibited, or caused to be exhibited as a model between 12 o'clock midnight and 6 a.m. and no such female minor shall be so employed between 10 p.m. and 7 a.m.

(d) Child model work permits shall accompany each minor employed, used, exhibited, or caused to be exhibited as a model and each person employing, using, or exhibiting the minor shall at the beginning and at the completion of such employment, use, or exhibition for each day indicate the exact hours of such employment, use or exhibition and shall in addition indicate the total hours of such employment, use or exhibition for such day.

(e) The certificate of physical fitness issued to each minor employed, used, exhibited, or caused to be exhibited as a child model shall, in the case of each such minor who is in attendance at a school, be made by the medical inspector charged with the duty of making physical examinations of all school children and for each such minor not in attendance at a school shall be made by a physician licensed to practice medicine in the State of New York except that in a city of over 1,000,000 population such certificate shall be issued only by a physician designated by the Department of Health if the minor is of school age.

(f) A child model work permit shall be issued by the superintendent of schools in cities and school districts employing a superintendent of schools and elsewhere by the district superintendent of schools. A superintendent of schools or district superintendent of schools may designate in writing one or more public school officials to act as certifying officers in his stead.

(g) A child model work permit may be revoked by the certifying officer at any time for any violation of law or of these regulations or for any other good cause.

191.1 Casual employment for which employment certificate is not required

(a) Yard work and household chores in and about a residence or premises of a nonprofit, noncommercial organization for which an employment certificate is not required under the provisions of subdivision 7 of section 3215 of the Education Law and section 131 of the Labor Law shall include the following:

- (1) Mowing grass by hand-mowers;
- (2) Weeding;
- (3) Raking leaves;
- (4) Watering lawns;
- (5) Shoveling snow;
- (6) Sweeping walks;
- (7) Washing dishes and other light kitchen work;
- (8) Other similar light household chores;
- (9) Acting as companion to younger children;
- (10) Caring for dogs and other pets which have no known vicious propensities; and
- (11) Acting as guides and other light housekeeping duties in hospitals and other noncommercial institutions.

RELATED LAWS *

- Article 8 - Section 100 - (Alcoholic Beverage Control Law) -
Employment of minors
- Article 10 - Section 1012 - (Family Court Act) Protection of
Abused Children
- Article 19 - Section 902 - Employment of medical inspectors
(school physician)
- Article 19 - Section 904 - Examinations by medical inspectors
(school physician)
- Article 21 - Section 2164 - (Public Health Law) - Immunization
- Article 51 - Section 2503 - Powers and duties of board of education
- Article 51 - Section 2508 and 2566 - Powers and duties of superintendent
of schools
- Article 51 - Section 2570 - Bureau of Compulsory Education (N.Y.C.)
- Article 61 - Section 3024 - Teachers responsible for record books
- Article 61 - Section 3025 - Verification of school register
- Article 73 - Section 2604 - Apportionment
Section 3604 - School Calendar on Legal Holidays
- Article 89 - Sections 4401-4407 - Handicapped children
- Article 93 - Section 4601 - Part-time schools
- Article 93 - Section 4608 - School to employment program
(See Commissioners Regulations 141.4)

* Articles 8, 10 and 21 are not Education Law

INDEX OF LAWS AND COMMISSIONERS REGULATIONS
CONCERNING ATTENDANCE

References are to page numbers

ABSENCE

- For religious education, 9, 42
- For religious observance, 9, 42

ATTENDANCE

- Age requirements for Compulsory Attendance, 6
- Amount and character of, 9
- Elsewhere than public school, 9
- Exceptions to, 6
- Exemptions from, 8, 39
- Upon evening instruction, 7
- Upon full-time instruction, 6
- Upon part-time instruction, 6

ATTENDANCE RECORDS

- Affidavit, 42
- Duties of Principals, 10
- Inspection of, 10
- Persons who shall keep, 10
- Presumptive evidence, 10
- Procedures for keeping, 10
- Required information, 42

ATTENDANCE TEACHERS AND SUPERVISORS

- Age of, 13
- Appointment of, 12
- Certification of,
 - permanent, 38
 - provisional, 38
 - waiver of provisional, 38
- Duties, 14
- Enforcement of law by, 12, 13
- Peace officer status, 15
- Powers of, 14
- Right of arrest, 14
- Right of entry, 14

CENSUS

- Duties of persons in parental relation, 36
- In cities of over 125,000, 35
- In cities and villages under 125,000, 35
- Of physically and mentally handicapped children, 35

INDEX

CHILDREN

- Definition and duties of parental relation, 11
- Delinquent, 15, 16
- Exemption from attendance, 8, 39-41
- Handicapped, 35-37
- Indigent, 9
- Use as entertainers and models, 29-31, 43-45

EMPLOYMENT OF MINORS

- Casual, 17, 46
- Certificating officer, 33
- Certificate of physical fitness, 23, 24
- Consent for employment as entertainers, 29-31, 43
- Employers duties and legal requirements, 25
- Procedures for issuance, 22
- Revocation of certificate, 33
- Special employment certificate, 26
- Types of certificates, 19, 20
 - child models, 31-33, 44, 45
 - farm work permit, 26
 - newspaper carrier, 28
 - street trades, 27
 - student non-factory, 19
 - student general, 19
 - full-time, 20
 - limited, 23
 - New York City Certificate of Eligibility, 18
- Types of employment prohibited, 17, 18, 29-31
- Use of children as entertainers, 20-22

EXEMPTION FROM ATTENDANCE

- Certificates
 - for mental or emotional disorders, 40, 41
 - for physical disability, 40, 41
 - for severe mental retardation, 40, 41
- Notice of exemption, 41
- Procedures for exempting children, 8, 39-41
- Qualifications of examiner for exemption, 40, 41
- Renewal of exemption certificate, 40, 41
- Transfer of exempted child, 41

INSTRUCTION REQUIRED

- Bilingual, 3, 4
- Courses of study, 4
- Language of instruction, 3
- Length of instruction, 5
- Quality of instruction, 3
- Texts, 3

INDEX

PARENTAL RELATION

- compliance with laws on attendance, 11, 12
- consent for employment certification, 23
- definition of, 11
- duties of, 11
- exception to duties, 12
- parental schools, 15
- penalty for withholding census information, 37
- procedure in court on school, delinquent, 16
- proof of minors literacy, 11
- right to suspension hearing of minor, 16, 17

RESIDENCY

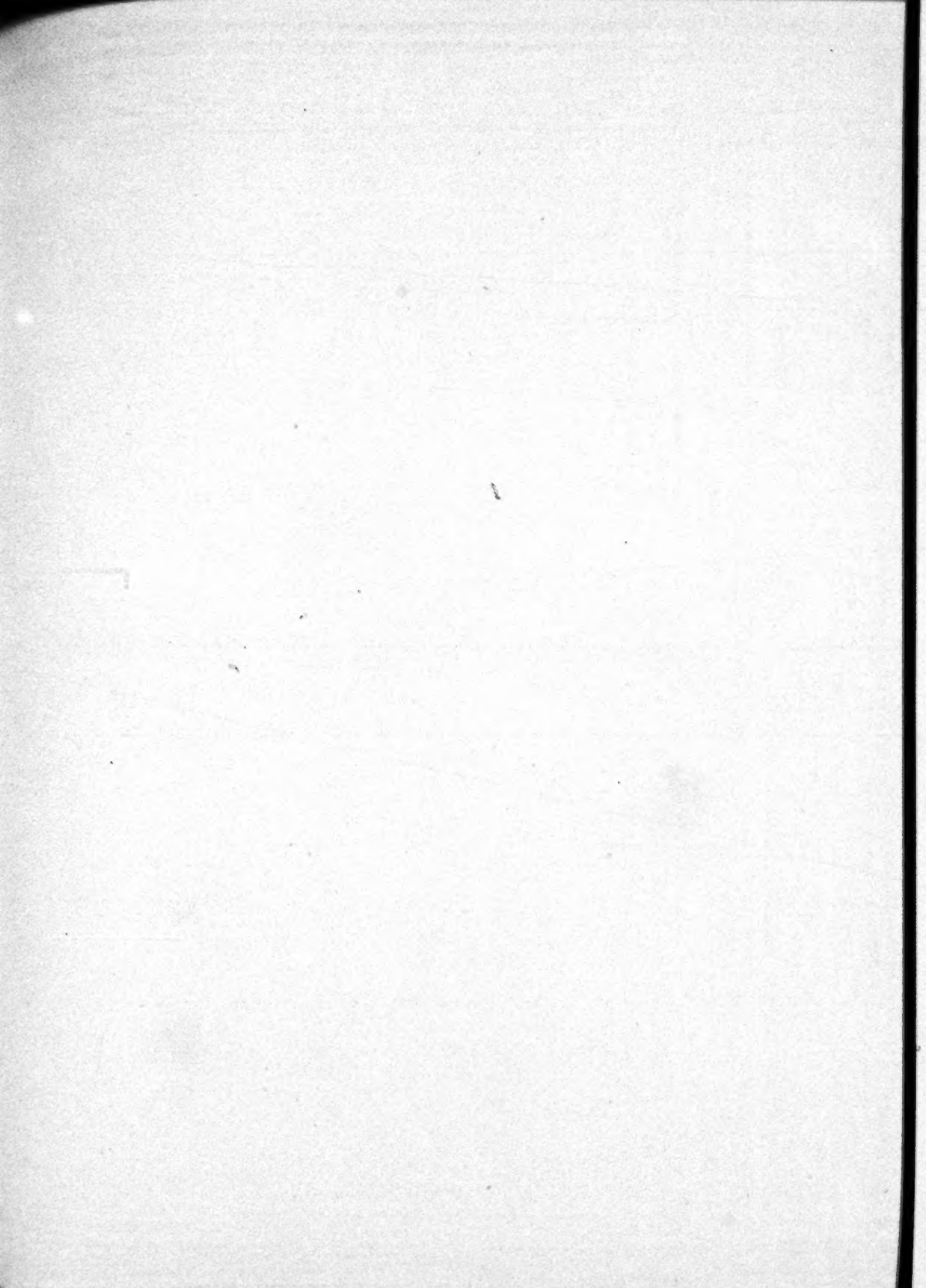
- definition of, 1
- definition of nonresident, 1
- residency of children in free family homes, 2
- residency of children in institutions, 1
- residency when district line intersects dwelling, 2
- tuition for nonresidents, 1

SCHOOL

- for delinquents, 15
- parental, 15
- special day school, 15
- school sessions,
 - length of, 5
 - holidays, 37

SUSPENSION

- Grounds for
 - disorderly, 16
 - endangers others, 16
 - feebleminded, 16
 - insubordinate, 16
- Hearings
 - formal, 16, 17
 - informal, 17
- Length of suspension, 16
- Procedures for suspension, 16
- Procedures after suspension, 17
- Right of counsel, 16, 17



Thomas W. Heath

Nonpublic Schools Mandated Services Cost Analysis Data

This report entitled, "Cost Analysis for Mandated Services" is divided into three sections. Each segment represents the professional efforts of three research consultants operating independently.

MODE I (ORANGE), Mr. Maurice G. Osborne

Former Assistant Commissioner for Educational Finance & Management Services

MODE II (GREEN), Dr. Earl F. Soper

Former Superintendent of Schools at Long Beach and Kingston

MODE III (BLUE), Dr. John L. Miller

Former Superintendent of Schools at Great Neck, Past President of the American Association of School Administrators

ON THE BASIS OF THE MATERIAL HEREIN PRESENTED, IT IS EVIDENT THAT THE \$28,000,000 APPORTIONED AMOUNT SPECIFIED WITHIN CHAPTER 138 OF THE LAWS OF 1970 IS JUSTIFIED.

IN ADDITION it also appears that nonpublic schools are currently providing considerably more in mandated services than they are receiving in financial aid.

ALTHOUGH the cost figures in each of the three modes could be used to authenticate a "substantially higher" apportionment allotment, it should be noted that inflationary variables enter the picture to an increasing degree as the cost figures move significantly beyond the per pupil amount specified in the law.

ACCORDINGLY, it would require further research with larger geographic parameters to either affirm or deny the reliability and validity of those areas of this report which project estimates "substantially" beyond the twenty-eight million dollar figure.

THEREFORE, this report should be considered exploratory and tentative---pending a more precise definition of terms and a more extensive population sample.

COST ANALYSIS DATA

Nonpublic Schools Mandated Services

(CONFIDENTIAL)

Exhibit D

MODE IPAGE

Direct Cost \$ 84,033.00 Orange - P. 15
Catholic High

Direct & Indirect Costs 120,305.00 Orange - P. 19
Catholic High

Total Aid Received under Chapter 138 (\$ 77,878.80)

Direct Cost 10,056.00 Orange - P. 24
St. Thomas Elem.

Direct & Indirect Costs 15,221.00 Orange - P. 26
St. Thomas Elem.

Total Aid Received under Chapter 138 (\$ 9,232.56)

MODE IIPAGE

Summary \$ 232.90 Green - P. 14
Holy Trinity High

Summary 595.94 Green - P. 22
Chaminade High

High School Formula under Chapter 138 (\$ 45.00)

Summary 77.56 Green - P. 29
Corpus Christi Elem.

Summary 86.57 Green - P. 40
Holy Family Elem.

Elementary School Formula under Chapter 138 (\$ 27.00)

MODE IIIPAGE

Average per pupil cost for mandated services Blue - P. 2
aid is \$82.50 a year as contrasted with the
Chapter 138 formula of \$27.00, elementary
level.

CONCLUSION

Green - P. 46

MEMORANDUM

TO :

FROM :

SUBJECT :

RE :

DATE :

BY :

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

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17. [Illegible]

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19. [Illegible]

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21. [Illegible]

22. [Illegible]

23. [Illegible]

24. [Illegible]

25. [Illegible]

MODE I

ANALYSIS

OF

EXPENDITURES

FOR

MANDATED SERVICES

IN

NONPUBLIC SCHOOLS

(Chapter 138 of the Laws of 1970)

COPY BOUND CLOSE IN CENTER

COPY BOUND CLOSE TO EDGE

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

Dr. Thomas D. Sheldon

Date: March 1, 1971

Thomas W. Heath

Subject: Nonpublic School Cost Analysis Design

The cost analysis for the "Mandated Services Legislation" has been designed according to three modes--each in a different geographic area and each with different research components:

Mode I - A CASE STUDY approach - "in-depth" type
with Maurice G. Osborne
functioning as a SED consultant

NONPUBLIC

(Catholic)

Area: "Mid-state" (Small city)

Troy: 1. Catholic High

Albany: 2. St. Thomas Elem.

Mode II - A FIELD SURVEY approach - "paired schools" type
with Earl F. Soper
functioning as a SED consultant

PUBLIC - NONPUBLIC

(Catholic)

Area: "Down-state" (Suburban)

Hicksville: 1. Hicksville High
2. Holy Trinity High
3. Dutch Lane Elem.
4. Holy Family Elem.

Mineola: 5. Mineola High
6. Chaminade High
7. Willis Avenue Elem.
8. Corpus Christi Elem.

NOTE:

(Public - Nonpublic: Comparative data analysis - public schools utilized as the "control group" and Catholic schools utilized as the "experimental group.")

Mode III - A FIELD SURVEY approach - "individual sample" type
with John L. Miller
functioning as a Hofstra University consultant

NONPUBLIC

(Multi-denominational)

Area: "Down-state" (Large city)

New York City 1. Grace Lutheran Elem.
2. Woodhull Episcopal Elem.
3. Immaculate Conception Elem.
4. St. Catherine Elem.
5. Hebrew Day School Elem.

THE STATE OF TEXAS
COUNTY OF DALLAS
I, the undersigned, Clerk of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the County of Dallas, Texas.

WITNESSED my hand and the seal of the County of Dallas, Texas, this 1st day of January, 1901.

CLERK OF THE COUNTY OF DALLAS, TEXAS

Attest: My hand and the seal of the County of Dallas, Texas, this 1st day of January, 1901.

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CLERK OF THE COUNTY OF DALLAS, TEXAS

INTRODUCTION

This Study was initiated by the State Education Department to determine the annual costs in a relatively large nonpublic high school and a nonpublic average sized elementary school of those mandated services identified in Chapter 138 of the Laws of 1970. Such mandated services are as follows:

- I. Examination and Inspection ✓
- II. Maintenance of Records of Pupil Enrollment ✓
- III. Maintenance of Pupil Health Records ✓
- IV. Recording of Personnel Qualifications and Characteristics
- V. Preparation and Submission to the State Of Other Required Reports such as:
 - a. Secondary School Report (Private Schools)
 - b. Report of Nonpublic Schools (Basic Educational Data Systems)

The two schools which were studied were Catholic Central High School in Lansingburgh, Rensselaer County and St. Thomas Elementary School in Delmar, Albany County. Throughout this report Catholic Central High School will be referred to as CCHS and St. Thomas Elementary School as St. Thomas.

The enrollment as of September 1970 in CCHS was 1769 and in St. Thomas it was 336. The enrollments in February 1971 were 1742 and 330 respectively.

This study was initiated by the State Education Department in 1950 as a result of a request by the State Board of Education for a study of the state of the public schools in New York State. The study was conducted by the State Education Department and the State Board of Education. The study was completed in 1951 and the results were published in 1952.

I. Background and Introduction

A. Maintenance of Schools of Public Education

B. Maintenance of Public Health Services

C. Maintenance of Educational Facilities and Equipment

D. Maintenance of Schools of Public Education

E. Maintenance of Schools of Public Education

F. Maintenance of Schools of Public Education

G. Maintenance of Schools of Public Education

H. Maintenance of Schools of Public Education

I. Maintenance of Schools of Public Education

J. Maintenance of Schools of Public Education

K. Maintenance of Schools of Public Education

L. Maintenance of Schools of Public Education

M. Maintenance of Schools of Public Education

N. Maintenance of Schools of Public Education

O. Maintenance of Schools of Public Education

P. Maintenance of Schools of Public Education

Q. Maintenance of Schools of Public Education

R. Maintenance of Schools of Public Education

S. Maintenance of Schools of Public Education

T. Maintenance of Schools of Public Education

U. Maintenance of Schools of Public Education

V. Maintenance of Schools of Public Education

W. Maintenance of Schools of Public Education

X. Maintenance of Schools of Public Education

Y. Maintenance of Schools of Public Education

Z. Maintenance of Schools of Public Education

PROCEDURE

The procedure used in making the Study was to contact the Supervising Principal and the remainder of the administrative staff. This was to acquaint the staff with the purpose of the Study and to solicit their assistance in the acquisition of data as well as making appointments with members of the teaching staff. To a large extent all teachers were contacted either in small groups or individually. One questionnaire was used to secure detailed information in the area of examinations (testing pupils). The records of the Central Office were used in compiling data not available through the teaching staff.

CCHS was visited first. The following sections of this report will provide the details of time used and the cost of same. Needless to say, certain assumptions had to be made and some costs had to be averaged. While a time - cost study of this nature cannot arrive at an absolutely accurate amount of time consumed in performing functions in detail or determine the exact cost in dollars, it is felt the composite cost figures come very close to the actual cost. It is pointed out that the composite cost or summary figures not only include actual dollar costs but also costs in terms of kind and benefits as well as indirect costs.

CATHOLIC CENTRAL HIGH SCHOOL

The staff of CCHS is as follows:

Administrative, Supervisory, Teaching and Clerical

Supervising Principal

Vice Principal - Student Affairs

Vice Principal - Administration

Guidance - Full Time

Guidance - Full Time

Guidance - Part Time

Guidance - Part Time

Librarians - Full Time (2)

Attendance Supervisor

Nurse

Classroom Teachers

Sisters 42

Priests 9

Lay 30

Total 81 (68 have homerooms)

Secretary - Guidance

Tuition Clerk

Store Manager - Half Time

Professional: Ratio to Pupils 1769

Overall Ratio 19.33

Administration Ratio 176.9

Administration Ratio Per 1,000
Students 5.6

Pupil Teacher Ratio 22.

Administrative, Instructional, Teaching and Classroom

Instructional Services

Classroom Services - Academic Affairs

Classroom Services - Administration

Classroom Services - Staff Room

Classroom Services - Staff Room

Classroom Services - Staff Room

Classroom Services - Staff Room

Classroom Services - Staff Room (3)

Classroom Services

Classroom

Classroom Services

Classroom Services

Classroom Services

Classroom Services

Classroom Services (100 hours per year)

Classroom Services

Classroom Services

Classroom Services - Staff Room

Classroom Services - Staff Room

Classroom Services

Classroom Services

Classroom Services

Classroom Services

Classroom Services

1. EXAMINATION AND INSPECTION

The following is a listing of the various examinations used at CCHS.

1. Teacher examinations, oral and written, prepared by teachers or taken from prepared materials.
2. Entrance examinations conducted annually for potential freshmen entrants the following Fall. This examination is required of all potential freshmen. It largely determines whether or not they are admitted to CCHS. The examination is secured through Princeton and is paid for by each student.
3. New York State Regents Scholarship Examinations are given in October of each year.
4. January and June Regents examinations.
5. SRA tests - juniors only.
6. Otis I Q Tests - freshmen only.
7. Kuder Preference Test.
8. Diocesan examinations.

The details regarding costs follow:

1. TEACHER EXAMINATIONS

<u>Subject</u>	<u>Cost</u>
Art	\$ 1,500
Business	8,700
English	12,050
Language	6,640
Math	4,460

The following is a listing of the various activities...

Teacher organizations, such as unions, organized by teachers...

These have organized various...

Teacher organizations conducted various...

During the following year, this organization is expected...

to be organized throughout the country...

admission of new students. The organization is expected...

and is expected to be a good student...

For this year, the various activities...

Summary of each year...

Summary of each year...

Summary of each year...

Summary of each year...

Summary of each year...

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Summary of each year...

<u>Subject</u>	<u>Cost</u>
Music	\$ 1,898
Religion	6,810
Science	13,324
Social Studies	9,370
	<u>\$64,752</u> \$64,752

2. ENTRANCE EXAMINATIONS

There are approximately 500 potential freshmen each year who take the entrance exam. In February of 1971, 490 took the exam. Twenty-seven teachers were assigned to supervise the exam. The time spent by each teacher in the examining room is from 8:30 a.m. to 1:00 p.m.

Exam papers are sent to the Central Office where they are checked for accuracy of count, bundled and shipped to Princeton. Printouts are prepared by Princeton and sent to CCHS as follows:

1. Alphabetical list.
2. High and low scores.
3. Individual home school list.

The latter is sent to the home school and the home school is asked to make recommendations based on the students' history in the home school.

The Supervising Principal and guidance personnel at CCHS study alphabetical and high - low lists along with recommendations, select a number of possible students for entry in the Fall and notify pupils and home schools regarding acceptance or rejection. Due to the fact that freshman admission is largely an administrative problem, the Supervisory Principal and, in a number of instances,

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 96. 1995
 97. 1996
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 99. 1998
 100. 1999

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of the growth of a nation from a collection of small, isolated colonies to a great, unified country. The story begins with the first settlers, who came to the New World in search of a better life. They found a land of opportunity, but also a land of hardship. The early years were marked by struggle and sacrifice, but the spirit of the pioneers was strong. They built a nation that was based on the principles of liberty and justice for all.

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the guidance people spend a great deal of time arranging meetings with parents and students to straighten out problems. The examination results require careful scrutiny on the part of the administration in order to avoid difficulties with disappointed parents and students.

Personnel:

Administration	\$200.00	
Teachers	285.00	
Clerical	15.00	
Miscellaneous	<u>10.00</u>	
Total	\$510.00 \$510 00

3. NEW YORK STATE REGENTS SCHOLARSHIP EXAMINATIONS

It is general practice for all seniors to take the Scholarship Exam. There is no charge for the exam forms and all correcting is done at the State level. Last Fall, 345 seniors took the exam. The time required is seven hours in one day. Fifteen proctors were assigned.

Personnel:

15 proctors x 7 hours x \$1.65/hr.	\$170.00	
Miscellaneous	<u>20.00</u>	
Total	\$190 00\$190.00

4. JANUARY AND JUNE REGENTS EXAMINATIONS

The number of teachers assigned to January and June Regents Exams are 7 and 88 respectively. There is no direct cost for the examination

The following people spent a great deal of time working on the
 with parents and children in connection with the
 examination of the records and the fact of a
 administration is given in the distribution with disapproval
 parents and children.

Expenditures	
Administration	1,000.00
Salaries	250.00
Travel	10.00
Supplies	10.00
Other	250.00
Total	1,520.00

NEW YORK STATE DEPARTMENT OF EDUCATION

It is hereby ordered that all reports to the Board
 of Education be made by the 15th day of the month of
 June, 1915, and that the Board be authorized to
 make such other orders as may be necessary for the
 proper conduct of the Department of Education.

Expenditures	
Administration	1,000.00
Salaries	250.00
Travel	10.00
Supplies	10.00
Other	250.00
Total	1,520.00

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forms. There is an indirect cost for assembling, sorting, recording, packaging and shipping. Time beyond the formal proctoring is spent in the marking of the exams. In January 1971, 118 papers were written and in June 1970, 2538 papers were written.

Personnel:

Administration	\$ 50.00	
Teachers: Jan. 70 hrs.*	140.00	
June 880 hrs.*	1,760.00	
Miscellaneous	<u>100.00</u>	
Total	\$ 2,050.00	\$2,050.00

*\$2.00 per hour

5. SRA TESTS

Juniors Only

Twenty proctors were assigned to the test which was scheduled for one hour. The test forms cost \$252.00. Additional time was required of the proctors in reviewing, assembling and recording.

Personnel:

	<u>Hours</u>	<u>Total</u>
20 teachers - 1 hr each*	20	\$ 32.00
Additional Time	20	32.00
Costs of Tests		<u>252.00</u>
Total		\$ 316.00... \$316.00

*\$1.615 per hour

6. OTIS I Q TEST

Freshmen Only

Twenty proctors were assigned to the test which was scheduled for one hour. The test forms cost \$150. Additional time was required of the proctors in reviewing, assembling and recording.

Personnel:

	<u>Hours</u>	<u>Total</u>
20 teachers - 1 hr. each	20	\$ 32.00
Additional Time	20	33.00
Cost of Tests		<u>150.00</u>
Total		\$ 215.00 ..\$215.00

7. KUDER PREFERENCE TESTS

This test is given annually primarily on a volunteer basis to about 150 students. Because of the nature of the test, little if any, supervision is needed and scoring takes about 30 minutes for each test. Including the cost of the tests at \$200, the total cost is estimated at \$400. \$400

8. DIOCESAN EXAMINATIONS

These examinations are given each June to ninth and tenth grade students. The subjects covered are Social Studies, English - nine and ten, Introduction to Business and Bookkeeping. About 1,350 examinations are given.

Each examination runs for three hours and another two hours is used by each proctor in correcting and recording. Fifty-four Sisters were assigned last June, therefore about 270 hours are required. The cost is approximately \$436.* \$436

*\$1.615 per hour

Summary of Findings

The following findings were obtained from the data collected during the study. The results are presented in the following table.

Category	Value
Category 1	10.5
Category 2	15.2
Category 3	20.1
Category 4	25.3
Category 5	30.4
Category 6	35.6
Category 7	40.7
Category 8	45.8
Category 9	50.9
Category 10	55.0

Conclusions

The results of the study indicate that there is a significant difference between the two groups. The data suggests that the treatment group performed better than the control group. The findings are consistent with the hypothesis of the study.

Recommendations

Based on the findings, it is recommended that the treatment be continued for a longer period. Further research is needed to confirm the results and explore the underlying mechanisms.

The study was limited by a small sample size and a short duration. Future studies should include a larger sample and a longer follow-up period to provide more conclusive results.

SUMMARY

Examination and Inspection

Teacher Examinations	\$ 64,752.00
Entrance Examinations	510.00
NYS Regents Scholarship Examinations	190.00
January & June Regents Examinations	2,050.00
SRA Tests	316.00
Otis I Q. Test	215.00
Kuder Preference Tests	400.00
Diocesan Examinations	<u>420.00</u>
Total	..\$68,853.00

(Total Aid Apportioned Under Chapter 138 - \$77,878.80)

192-25A

100

11. PUPIL ENROLLMENT (ATTENDANCE)

A 20-week attendance card (IBM) for each of two semesters is punched for each pupil in the Central Office. Pupils are assigned to homerooms by way of card - Central Office responsibility. Cards are kept by each homeroom teacher as a daily record of attendance. Each day (8:30 a.m.) each homeroom teacher sends absence cards only to the Central Office. The Attendance Supervisor types out the list of names of absentees with homeroom numbers. The Attendance Supervisor holds the cards and determines reasons for absence - if no information comes to her from parents, she calls the parents.

Each day the cards in the Central Office are run through the sorter and sorted alphabetically by class years. After absence information is satisfactory, cards are resorted into homeroom classification and returned to homerooms late in the afternoon.

At the end of each marking period (4 per year), a set of "marked sensed" attendance cards go to each homeroom teacher - one set for the year.

The homeroom teacher uses her regular homeroom card to determine total absences and tardinesses and then transfers such totals to the marked sensed card.

When the third marking period starts, homeroom attendance cards go to the data processing room - there they are sorted alphabetically and sorted, and a new set is made up and sent to homerooms for the last two marking periods. Attendance reports are prepared monthly by the Attendance Supervisor for her office use and at times (not regularly) a report goes to the Diocesan Office. The report to the State Education Department at the end of the year will (probably) come from the Diocesan Office.

The first of the two documents is a letter from the Government of the United States to the Government of the Republic of China, dated January 1, 1945. The second document is a letter from the Government of the Republic of China to the Government of the United States, dated January 1, 1945.

The marked sensed cards are filed at the end of the year with the homeroom cards.

Central Office Time Determination:

Attendance Supervisor - 22/24 of each work day is devoted to attendance (The school operates on a modular schedule.)

Additional Time as follows:

A.M. & P.M.	1½ hours, daily	
Preparing reports at home	- 27 hours yearly	
22/24 assuming 180 days		165
Additional days, assuming 6½ hours/day		<u>46</u>
Total Equivalent Days		211
Salary: 180 days		\$ 2,100.00*
31 additional days		<u>373.00</u>
Central Office		\$ 2,473.00
Supplies:		90.00
IBM Rentals		<u>409.00</u>
Total Central Office Cost		\$ 2,972.00 \$2,972.00

Classroom Teacher Time Determinations:

	<u>Number</u>	<u>Time Per Day Min.</u>	<u>Days</u>	<u>Total Time Hours</u>	<u>Salary</u>	<u>Total Cost</u>
Sisters	40	20	180	2,400	\$ 2,100	\$ 3,876
Priests	2	20	180	120	2,500	230
Lay	11	20	180	660	6,000	3,060
Lay	<u>15</u>	20	180	<u>900</u>	6,200	<u>4,278</u>
Total	68			4,080	\$13,044

*Total Sister Salary

SUMMARY

Pupil Enrollment (Attendance)

Central Office Costs \$ 2,972

Classroom Teacher Costs 11,444

Total \$ 14,416

~~\$14,416~~

SECRET

Special Agent in Charge

Central Office

Classification

Date

III. PUPIL HEALTH RECORDS

A full-time nurse is assigned and paid for by the Lansingburgh Public School. Office space is furnished by Catholic High School. The nurse assists the medical doctor on all examinations. The Central Office key punches annually an IBM card for each student showing name, address, telephone number and another person to call except parents in case of an emergency. The Central Office supplies IBM cards, key punch and key punch operators at no charge to the public school. At the time of physical examinations the Central Office prepares a schedule for such examinations for the medical doctor and nurse - it posts copies of such schedules on the gymnasium bulletin board and sends a personal note to each pupil - no charge is made to the public school.

Central Office Time & Cost Determinations:

Personnel	\$ 90.00	
Key Punch Time	29.00	
Office Space	200.00	
Supplies	<u>10.00</u>	
Total	\$ 329.00	\$ 329.00

IV. BASIC EDUCATIONAL DATA SYSTEM

Due to the fact that basic data had already been acquired and recorded for other administrative purposes, only a small amount of time was required in completing the Basic Educational Data System Report (BEDS). The cost of compiling such a report is estimated at \$30.00,.....~~\$30.00~~

V. SECONDARY SCHOOL REPORT

This mandated service requires the recording and compiling of data on each individual staff member indicating all characteristics relating to his or her qualifications in connection with the particular assignment of duties. These recordings become permanent personnel records and provide data for the Secondary School Report.

The basic data is assembled under the supervision of the Assistant Principal and the Secondary School Report is compiled by that office under the supervision of the Supervising Principal.

Cost Determination

	<u>Hours</u>
Teacher Time in Providing Data	90
Compiling and Recording Data	15
Compiling Secondary School Report	10
Typing and Clerical	10
Miscellaneous	<u>10</u>
Total	135

Because the entire professional staff and others were involved, an average hourly wage is assumed @ \$3.00.

Total: 135 hours x \$3.00 \$405.00~~\$405.00~~

One of the first things that I noticed when I stepped out of the plane was the noise. It was a very loud noise, and it was very different from the noise that I had heard in the city. It was a noise that I had never heard before, and it was a noise that I had never heard of. It was a noise that I had never heard of, and it was a noise that I had never heard of.

The Great Wall of China

The Great Wall of China is one of the most famous landmarks in the world. It is a long wall that stretches across the northern part of China. It was built by the Chinese to protect their country from invasions. The wall is made of stone and brick, and it is very old. It is a very important part of Chinese history, and it is a very famous landmark in the world. It is a long wall that stretches across the northern part of China. It was built by the Chinese to protect their country from invasions. The wall is made of stone and brick, and it is very old. It is a very important part of Chinese history, and it is a very famous landmark in the world.

Great Wall of China

100	100	100	100	100	100	100	100	100	100
100	100	100	100	100	100	100	100	100	100
100	100	100	100	100	100	100	100	100	100
100	100	100	100	100	100	100	100	100	100
100	100	100	100	100	100	100	100	100	100
100	100	100	100	100	100	100	100	100	100
100	100	100	100	100	100	100	100	100	100
100	100	100	100	100	100	100	100	100	100
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SUMMARY
OF
DIRECT COSTS

1. Teacher Examinations	\$ 68,853.00	
2. Pupil Enrollment (Attendance)	14,416.00	
3. Pupil Health Records	329.00	
4. Recording and Reporting of Personnel Qualifications and Characteristics - Basic Educational Data System	30.00	
5. Secondary School Report	405.00	15,180.00
Total	\$ 84,033.00	\$84,033.00

(Total Aid Apportioned Under Chapter 138 - \$77,878.80)

APPENDIX

EXHIBIT 100

1. 100.00

2. 100.00

3. 100.00

4. 100.00

5. 100.00

6. 100.00

Total

Total All Appointments and Other Charges 100.00

COSTS BEYOND DIRECT COSTS

Payments in Kind Or Benefits

CCHS pays annually to St. Joseph's Provincial House, Latham, Albany County, \$400 for each St. Joseph Sister assigned to CCHS. During 1970-71 26 Sisters were assigned.

CCHS provides transportation for 23 Sisters from St. Joseph's Provincial House to CCHS daily. Such transportation is provided in station wagons owned by CCHS and a Volkswagon bus rented by CCHS.

CCHS provides the Convent House which houses the Sisters of Mercy assigned to CCHS. During 1970-71, 16 Sisters were assigned. In addition to providing the Convent House as such, CCHS maintains it to the extent of all repairs, heat, electricity and replacement of furniture, etc.

CCHS provides transportation for the 16 Sisters from the Convent House to CCHS daily. Such transportation is provided in one station wagon owned by CCHS and in a rented taxi.

There are three other Sisters for whom CCHS provides maintenance. CCHS provides a home(house) for the Supervising Principal and other Priests assigned to CCHS. CCHS maintain the house (repairs, improvements, etc.) and supplies heat, electricity and insurance.

X

Kind and Benefit Costs

Sisters' Maintenance 29 x \$400	\$ 11,600.00
Sisters' Transportation, St. Joseph	4,050.00
Sisters' Transportation, Mercy Convent	2,960.00
Faculty Residences	<u>10,000.00</u>
Total	\$ 28,610.00

It is general practice to assign Sisters as far as possible to proctor the various specialized examinations that are given throughout the year. The purpose is to reduce the cost.

The above kind and benefit costs associated with the Sisters total is \$28,610 annually. The total salaries paid to religious teachers are about 40% of the total annual teachers' salaries and the determined cost of mandated services is supplied to the extent of 63% by religious teachers. Therefore, it seems logical to apply to the cost of mandated services, 40% of \$26,610, which is \$11,444, but to proportion this in the relationship of the salaries of religious teachers to the cost of all teachers, namely, 63% of \$11,444 or \$7,310.....~~\$7,310~~

Indirect Costs

Custodial Service	CCHS	\$ 51,100.00
Electricity	CCHS	12,000.00
Heating	CCHS	8,000.00
Maintenance	CCHS	14,000.00
Insurance	CCHS	12,000.00
Social Security	CCHS	13,000.00
Pensions	CCHS	3,000.00
Telephone	CCHS	<u>2,750.00</u>
Total		\$ 115,850.00

Some portion of these annual indirect costs should be assigned to the cost of mandated services. This can be done by using the same ratio that was used in connection with kind and benefit costs (page 17) namely, 40% of 64% or about 25%, or ~~\$28,962.00~~\$28,962.00

(Total Aid Apportioned Under Chapter 138 - \$77,878.80)

SUMMARY
OF
DIRECT, KIND, BENEFIT
AND COMPUTED COSTS

Direct	\$ 84,033.00
X Kind & Benefit	7,310.00
Computed	<u>28,962.00</u>
Total <u>\$120,305.00</u>

The average daily attendance in September, 1970 was 1730. When this is divided into the total expenditures for mandated services, the per pupil cost is \$69.54, as opposed to the current apportionment amount of \$45.00.

ADA Sept. 1730

ADA Oct. 1704

(Total Aid Apportioned Under Chapter 138 - \$77,878.80)

XX

ST. THOMAS ELEMENTARY SCHOOL

The staff of St. Thomas is as follows:

Administrative and Teaching

Principal - Full Time

Religious Sisters - 5

Lay Teachers - 4

Music Teacher (Sister) - 1 day per week

Remedial Reading (Federal) - 3 hrs. - 4 days a week

Speech Therapist (Federal) - 1 day per week

Enrollment - Sept. 1970, K-8	336
Enrollment - Feb. 1971, K-8	330
ADA - Oct. 1970, Gr. 1-6	234.30
Gr. 7-8	<u>64.45</u>
Total	298.75

Overall Ratio 31

Pupil Teacher Ratio 34.3

STATE OF NEW YORK

IN SENATE

January 11, 1910

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 1, 1899

ALBANY:

THE UNIVERSITY OF THE STATE OF NEW YORK

PRINTING OFFICE

1910

100

100

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I. EXAMINATION AND INSPECTION

All grades provide for periodic examinations throughout the school year. In addition, special examinations are given at certain specific times and in selected grades.

The costs of all such examinations including materials are listed below by grades. Such costs take into consideration the various levels of teacher salaries.

Kindergarten	\$ 285
Grade 1	285
Grade 2	390
Grade 3	820
Grade 4	2,800
Grade 5	350
Grade 6	1,250
Grade 7	390
Grade 8	290
Reading Specialist	258
Speech Therapist	<u>516</u>
	\$ 7,634..... \$7,634

EXAMINATION AND INVESTIGATION

All grades provided for testing examination throughout the
 In addition, special examination are given at various points
 and in various grades.
 The course of all these examinations including material and
 by means of such tests the information is obtained
 for the purpose of

Investigation	
Grade 1	100
Grade 2	100
Grade 3	100
Grade 4	100
Grade 5	100
Grade 6	100
Grade 7	100
Grade 8	100
Grade 9	100
Grade 10	100
Grade 11	100
Grade 12	100
Grade 13	100
Grade 14	100
Grade 15	100
Grade 16	100
Grade 17	100
Grade 18	100
Grade 19	100
Grade 20	100
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Grade 90	100
Grade 91	100
Grade 92	100
Grade 93	100
Grade 94	100
Grade 95	100
Grade 96	100
Grade 97	100
Grade 98	100
Grade 99	100
Grade 100	100

II. PUPIL ENROLLMENT (ATTENDANCE)

Attendance is checked and recorded daily by each classroom teacher.

In addition each classroom teacher makes a monthly check and presents attendance registers to Principal. The Principal prepares monthly reports and annual reports.

A total of 541 hours is required for teachers and Principal to complete the above process. When this is computed on the basis of the various lay salaries and religious salaries the total cost is\$2,300.00

III. PUPIL HEALTH RECORDS

The responsibility for providing health services to nonpublic schools in Albany County rests with the County Health Department. Apparently, the nonpublic schools and the public schools require first that physical examinations be performed by the family physician. If this is not financially possible then the County provides the examination for nonpublic school students. The results of all physical examinations are made available to the nonpublic school and retained as a permanent record.

Nurse service is provided on a voluntary basis by a local R.N. at no cost to the nonpublic school. However, approximately 30 hours were devoted by the R.N. and the Principal in preparing data on health cards. When the 30 hours are translated into costs the total is approximately \$100.00\$100.00

IV. BASIC EDUCATIONAL DATA SYSTEM (BEDS)

The above topic relates to an annual report required by the State Education Department. It includes certain data pertaining to personnel, students and facilities. Some of the required data has been assembled and recorded for other purposes before the BEDS report is required. Because of this only a limited time is needed in compiling the BEDS report.

The estimated time required of the principal's office is only a few hours and is therefore, negligible in terms of dollar costs - probably not in excess of \$10.00.....~~\$10.00~~

V. SECONDARY SCHOOL REPORT

This is an annual report required by the State Education Department. It involves certain data which has been previously assembled for other purposes. Due to the fact that the results of the previous work are not being included in this report under any other section, the time requirement is included here. The total estimated time is seven hours and translated into costs is \$12.00~~\$12.00~~

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SUMMARY
OF
DIRECT COSTS

- | | |
|----------------------------------|------------|
| 1. Teacher Examinations | \$ 7,634. |
| 2. Pupil Enrollment (Attendance) | 2,300. |
| 3. Pupil Health Records | 100. |
| 4. Basic Educational Data System | 10. |
| 5. Secondary School Report | <u>12.</u> |

Total \$10,056.

(Total Aid Apportioned Under Chapter 138 - \$9,232.56)

SECRET

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11. 11. 11.

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13. 13. 13.

COSTS BEYOND DIRECT COSTS

Payments in Kind Or Benefits

Lay teachers are covered by Social Security and have the opportunity to participate in Blue Cross, the Diocesan Pension Plan and the Insurance Plan. The cost of these benefits to St. Thomas School is \$2,700 annually. The Parish also provides a convent home for the religious teachers. The annual cost of such a home amounts to approximately \$6,200. The total salaries paid to religious teachers are about 30% of the total annual teachers' salaries and the determined cost of mandated services is supplied to the extent of 25% by religious teachers. Therefore, it seems logical to apply to the cost of mandated services, 30% of \$6,200, which is \$1,860, but to proportion this in the relationship of the salaries of religious teachers to the cost of all teachers, namely 25% of \$1,800 or \$465.....~~\$465.00~~

Indirect Costs

The annual cost of operating the school itself including all salaries is about \$63,250. It seems logical that some proportion of this annual cost should be assigned indirectly to the cost of mandated services. This can be done by using the same ratio that was used in connection with kind and benefit costs, namely about 7.5% or~~\$4,700.00~~

DIRECT, KIND, BENEFIT
AND COMPUTED COSTS

10,056

7...\$15,221.00

\$9,232.56

(Chapter 138 Grades 1-6 currently \$27.00, Grades 7-12 currently \$45.00)

MODE I - 26

SECRET

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MODE 11

FIELD SURVEY

OUTLINE

1. Educational Setting - Purpose - Objectives
2. Plan - Procedure - Limitations
3. Format of Case Study Questionnaire
4. Hicksville Component - Secondary
5. Mineola Component - Secondary
6. Mineola Component - Elementary
7. Hicksville Component - Elementary
8. Summary of Data
9. Field Survey Limitations
10. Conclusions

1911

1912

1913

Investigations - 1911 - 1912

1. The 1911-1912 season

2. The 1912-1913 season

3. The 1913-1914 season

4. The 1914-1915 season

5. The 1915-1916 season

6. The 1916-1917 season

7. The 1917-1918 season

8. The 1918-1919 season

9. The 1919-1920 season

EDUCATIONAL SETTING

The 1970 Legislature passed an act to provide for the apportionment of State monies to certain nonpublic schools in connection with inspection and examination and made provision to implement the legislation in the amount of \$28,000,000. This became Chapter 138 of the Laws of 1970. In effect the new law provided 15 cents a day per child in grades 1-6 and 25 cents per day for students in grades 7-12 for covered services.

The amount to be apportioned to each qualifying school shall be the sum of the following:

- a. The product of 15 cents multiplied by 180, multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and (\$27.00 maximum).
- b. The produce of 25 cents multiplied by 180, multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve (\$45.00 maximum).

In August 1970, the legal regulations and guidelines were made public in a printed pamphlet entitled, "Law Regulations and Guidelines - Apportionment to Nonpublic Schools," and were distributed to all interested parties by the New York State Education Department. The pamphlet was supplemented by application forms for the nonpublic school's assistance, together with instruction

In the fall of 1970, Dr. Thomas W. Heath was named Coordinator for Nonpublic School Services. As Coordinator, Dr. Heath has the responsibility to implement the new legislation providing aid to the nonpublic schools for examination and inspection services.

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In consultation with Dr. Philip B. Langworthy, Acting Deputy Commissioner, Dr. Stanley L. Raub, Associate Commissioner and Assistant Commissioners Dr. John W. Polley and Dr. Bernard F. Haake, Dr. Heath recommended and approval was given for field survey involving comparison of costs of public and nonpublic schools for mandated services covered by the new legislation in three separate State locations. In January of 1971, Dr. Earl F. Soper was retained by the New York State Education Department to conduct the field survey.

Dr. Soper's responsibility included the staff interviews in each selected public and nonpublic school, the development of a questionnaire to elicit data for cost comparisons and a report which would summarize findings and offer recommendations pertinent to spirit of the new legislative mandate.

PLAN

The projections for the field study involved four component elements. A survey would be made in the Nassau County area and involve in effect a comparison of results gathered in both a public and a nonpublic school in the area. Areas selected included Hicksville and Mineola. In Hicksville, Holy Trinity Diocesan High School was paired with Hicksville High School. In Mineola, Chaminade High School was paired with Mineola High School. At the elementary level Corpus Christi Elementary School and Willis Avenue Elementary School were paired for the Mineola elementary components, while Holy Family Elementary School was paired with Dutch Lane Elementary School for the Hicksville elementary components.

COMPONENTS

PUBLIC

Hicksville High School
Mineola High School
Dutch Lane Elementary School
Willis Avenue Elementary School

NONPUBLIC

Holy Trinity High School
Chaminade High School
Holy Family Elementary School
Corpus Christi Elementary School

PROCEDURE

In each component of the field survey, Dr. Soper met with the school authorities, explained the purpose of the study and interviewed staff to ascertain the time spent on mandated services covered by the act. Staff fell generally into two major categories. First, were those special staff personnel generally serving all the children wherein a percentage of their professional or non-teaching time was devoted to educational services covered by Chapter 138. The second group were those staff members who served students in mandated services on a varied and irregular time schedule. This group was sampled. A conference furnished appropriate explanation and the amount of time devoted to mandated services was elicited by careful conference-questionnaire technique. In case of sampled teachers it is noted that such service for each teacher was to the classes covered by that teacher each day. Accordingly, varied amounts of time were expected and reported by the sample participants.

Time given by professionals to handle mandated services, testing particularly, often came during out of school hours. It was necessary, therefore, to equate this time on a comparable basis to a paid day at salary received for seven hours of service. In all fairness it does not reflect actual dollars since these out of school hours are a part of a teachers expectancy rather than required or mandated hours of service.

PROCEDURAL - LIMITATIONS

1. It quickly became apparent that interpretations of the service as applied were necessary. Accordingly, tests were interpreted to mean the instrument used to measure educational progress. This involved the preparation of the tests, gaining familiarity with guides, etc., the test administration and correcting together with follow-up including recording and disseminating data.
2. Evaluation was considered to be a more restricted professional endeavor limited to the test mechanic itself.
3. It was assumed that a per diem rate for ten month employees would be determined by dividing the annual salary by 180 as set forth in the act itself.
4. The mechanics of dropping cents and using dollars only were frequently used.
5. It was assumed where necessary that there were 20 working days, per month, 40 weeks per year. A professional day was considered to be seven hours. Secretaries were also gauged at seven hours. Half days were rounded off. Peak periods were prorated to a typical week.
6. Where professional estimates of time spent were given as a range (i.e., 10% - 20%) the mid point of the range was used. Likewise, when staff time percentages were estimated by two or more staff members relative to a particular position and a difference in time estimates were received, the average was used.
7. Time limitations made it necessary to limit the survey to staff time. No consideration was given to the pro rata cost of mandated services involved with plant, plant maintenance, plant service

RECEIVED - LIMITED

It is further stated that the investigation of the records of the office of the Secretary of the Interior, Department of the Interior, Washington, D. C., has been completed and the results of the same are being prepared for the attention of the Commission. It is further stated that the investigation of the records of the office of the Secretary of the Interior, Department of the Interior, Washington, D. C., has been completed and the results of the same are being prepared for the attention of the Commission.

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personnel, plant utilities or equipment and supplies of any kind.

8. Salaries for members of the religious community were taken at total salaries which included donated services and remunerated services.
9. Time estimates include a composite of service which cover within day, after hours, evening services, vacation and/or weekends. This time was interpreted as a total service of days as indicated.
10. Each of the selections from the three components represented but a single building survey, were not intended to be district-wide and contained no basic postulation of costs for covered services, other than the State appropriation.
11. Time limitations make it necessary to list sample elementary classroom teachers. Special teachers in pupil personnel services have been included. However, time would not permit interviews with special teachers of art, music, physical education, etc. Consequently, time spent by these teachers have not been included. Best estimates indicate that since these teachers serve larger numbers of students weekly the cost would not substantially change the figures given herein.

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A. Staff member - Personal Data

Name

School

Grade

Subject

Title

Salary

Other

Number of Pupils

Number of Staff

B. Examination and Inspection (Mandated Evaluation)

Testing - All Types

Typical Week - Time Required

Teacher-made Tests

Preparation

Administration

Correction

Follow Up (Reporting)

Department or Grade Tests

Preparation

Administration

Correction

Follow Up

Achievement Tests

Preparation

Administration

Correction

Follow Up

Serial number - Personal Data

Name

School

Grade

Subject

Title

Salary

Rate

Number of Pupils

Number of Staff

Examination and Inspection (Inspected Evaluation)

Location - All Types

Typical Week - Time Schedule

Teacher and Staff

Organization

Administration

Curriculum

Relation to Community

Department or Grade Level

Preparation

Administration

Organization

Relation to

Administration

Preparation

Administration

Organization

Relation to

Intelligence Tests

Preparation

Administration

Correction

Follow Up

PEP Tests Grades 3, 6, 9

Preparation

Administration

Correction

Follow Up

Other

Preparation

Administration

Correction

Follow Up

Note: Administration includes:

Supervision

Preparation - prepare test, read and study manual, etc.

Follow Up - recording results, individual records, etc.

Administrative

Personnel

Finance

Legal

Public Relations

Information Systems

Facilities

Security

Compliance

Quality Assurance

Environmental

Health and Safety

Employee Relations

Training and Development

Compensation and Benefits

Records Management

Corporate Governance

Business Continuity

Research and Innovation

Marketing and Sales

Customer Service

Product Development

Supply Chain Management

Logistics

Procurement

Vendor Management

Contract Management

Project Management

Change Management

Organizational Development

C. Attendance

Time for routine daily attendance

Time for register

Time for register reports

Time for data process forms

Time for data process reports

Time for permanent records

Time for conferences

Nurse

Social Worker

Psychologist

Guidance Counselors

Attendance Teacher

Principal

Superintendent of Schools

Parent

Child

Other

Time for count

Time for general group conference

D. Health Records

Time for taking data

Time for recording data for report cards

health records

personnel records

Time for study and review

1. The first part of the report is a summary of the work done during the year.

2. The second part is a detailed account of the work done during the year.

3. The third part is a summary of the work done during the year.

4. The fourth part is a summary of the work done during the year.

5. The fifth part is a summary of the work done during the year.

6. The sixth part is a summary of the work done during the year.

7. The seventh part is a summary of the work done during the year.

8. The eighth part is a summary of the work done during the year.

9. The ninth part is a summary of the work done during the year.

10. The tenth part is a summary of the work done during the year.

11. The eleventh part is a summary of the work done during the year.

12. The twelfth part is a summary of the work done during the year.

13. The thirteenth part is a summary of the work done during the year.

14. The fourteenth part is a summary of the work done during the year.

15. The fifteenth part is a summary of the work done during the year.

16. The sixteenth part is a summary of the work done during the year.

17. The seventeenth part is a summary of the work done during the year.

18. The eighteenth part is a summary of the work done during the year.

19. The nineteenth part is a summary of the work done during the year.

20. The twentieth part is a summary of the work done during the year.

21. The twenty-first part is a summary of the work done during the year.

22. The twenty-second part is a summary of the work done during the year.

23. The twenty-third part is a summary of the work done during the year.

24. The twenty-fourth part is a summary of the work done during the year.

Holy Trinity High School
Hicksville, New York

Father Young, Principal at Holy Trinity, Assistant Principal, Sister Marie Kennedy and Sister Catherine William and members of the staff made the writer more than welcome. Four staff members of social studies, English, mathematics and science were jointly interviewed as were the administrators. The staff sample comprised two day teachers and two Sisters. Four different disciplines were also sampled. Three sampled were department heads. From this sample determinations were made relative to the typical staff members providing mandated services.

Subsequently, the nurse, head guidance counselor, dean of students and principal's secretary were interviewed. In the case of these specialists, professional estimates of the percentage of the staff member's time spent on these covered services were given. The principal's secretary provided data on salaries for computing for pupil costs.

The department chairmen felt that time spent by them in administration-supervision equaled time spent by them in their teaching capacities for these mandated services. Students at this Diocesan high school attended generally more (6.8) classes on the average. There are 1995 students enrolled with a staff of 94.

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Holy Trinity High School
Hicksville, New York

Tabulation of Data

General

1. Number of students - 1995

2. Number of staff (Professional) 94

Staff - Percentage-Mandated Services

1. Professional

<u>Name</u>	<u>Actual Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Asst. Prin. Sister Marie Kennedy	\$ 2,400	\$13,800	\$16,200	20%	\$ 3,240	@ 1995
Asst. Prin. Sister Catherine William	2,400	13,800	16,200	15%	2,430	
Nurse, Miss Virginia Byrne			15,220	50%	7,610	
Nurse, Mrs. Dorothy Gallahue			11,784	50%	5,892	
Counselor* - Sister Teresa McGreevy	2,400	11,800	14,200	27.5%	3,905	
Counselor* - Sister Rose Anastasia	2,400	11,200	13,600	60%	8,160	
Counselor* - Richard Laskowski	10,700	--	10,700	12.5%	1,337	
Counselor* - Pasquali Amendolia	15,100	--	15,100	12.5%	1,887	
Counselor* - James Wolan	14,400	--	14,400	12.5%	1,800	
Counselor* - John Moran	12,400	--	12,400	12.5%	1,550	
Principal - Father Young	2,100	15,900	18,000	5%	900	
Total					\$38,711	
Professional (Sub Total) Per Pupil						\$19.40

Examination Only

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TABLE OF DATA

1991			
NUMBER OF STUDENTS			
NUMBER OF STUDENTS (1991)			
TOTAL - 1991			
NAME	ACTUAL	ESTIMATED	TOTAL
1. JAMES EARL RAY	2,500	21,000	23,500
2. JAMES EARL RAY	1,500	12,000	13,500
3. JAMES EARL RAY	1,500	12,000	13,500
4. JAMES EARL RAY	1,500	12,000	13,500
5. JAMES EARL RAY	1,500	12,000	13,500
6. JAMES EARL RAY	1,500	12,000	13,500
7. JAMES EARL RAY	1,500	12,000	13,500
8. JAMES EARL RAY	1,500	12,000	13,500
9. JAMES EARL RAY	1,500	12,000	13,500
10. JAMES EARL RAY	1,500	12,000	13,500
11. JAMES EARL RAY	1,500	12,000	13,500
12. JAMES EARL RAY	1,500	12,000	13,500
13. JAMES EARL RAY	1,500	12,000	13,500
14. JAMES EARL RAY	1,500	12,000	13,500
15. JAMES EARL RAY	1,500	12,000	13,500
16. JAMES EARL RAY	1,500	12,000	13,500
17. JAMES EARL RAY	1,500	12,000	13,500
18. JAMES EARL RAY	1,500	12,000	13,500
19. JAMES EARL RAY	1,500	12,000	13,500
20. JAMES EARL RAY	1,500	12,000	13,500

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2. Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
in. Office - Mrs. Tapia	\$ 6,864	40%	\$ 2,745	69
in. Office - Mrs. Wilshusen	8,408	25%	2,102	1995
a. Office - Mrs. Kelly	6,292	50%	3,146	
n. Office - Mrs. Powens	4,862	100%	4,862	
n. Office - Mrs. Conway	6,292	30%	1,887	
a. Office - Mrs. Teleshia	4,862	67.5%	3,281	
tendance - Mrs. O'Melia	4,576	100%	4,576	
- Sister Mary Beatrice	2,400	100%	2,400	
idance* - Mrs. Schilling	5,491	77.5%	4,255	
idance* - Mrs. Magenheimer	4,619	77.5%	3,579	
idance* - Mrs. Mollard	4,576	77.5%	<u>3,546</u>	
		Total	\$36,379	

Nonprofessional (Sub Total) Per Pupil

\$18.23

Examination Only

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C. Staff - Per Diem-Mandated Services

1. Professional Sample

<u>Name</u>	<u>Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Daily \$180</u>	<u>Days of Services</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
Eval. - Sister Mary Healy	\$ 2,400	\$11,800	\$14,200	78	53		@175
Eval. - James Boglioli			9,900	55	174		@175
Eval. - Sister Agnes Cunningham	2,400	11,200	13,600	75	45		@160
Eval. - Ed Rodriquez			8,500	47	16		@170
Attendance - Sister Mary Healy					6		
Attendance - James Boglioli					6		
Attendance - Sister Agnes Cunningham					6		
Attendance - Ed Rodriquez					6		
Health		NONE					
Total Sister Mary Healy				78	59	\$ 4,602	\$ 26.29
James Boglioli				55	180	9,900	56.57
Sister Agnes Cunningham				75	51	3,825	23.90
Ed Rodriquez				47	22	1,034	6.08
Total - Per Pupil - Per Class							\$112.84
Average - Per Pupil - Per Class							28.21
Total - Average of 6.8* classes per pupil							191.82

2. Professional Sample - Supplementation

<u>Name</u>	<u>Total Salary</u>	<u>Daily \$180</u>	<u>Days of Services</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
Business Teacher - Sister Mary Louise	\$13,600	75	14	\$1,050	@ 1995
Business Teacher - Sister Mary Thomas	10,400	57	14	798	
Business Teacher - Sister Mary Anita	10,400	57	14	798	
Total				\$2,646	
Average					\$1.32
Sister Teresa McGreevy					

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<u>Name</u>	<u>Total Salary</u>	<u>Daily \$180</u>	<u>Health Days of Service</u>	<u>Attendance Days of Service</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
Guidance - Sister McGreevy	\$14,200	78	6	3	\$ 702	@ \$1,995
Guidance - Sister Anastasia	13,600	75	6	3	675	
Guidance - Mr. Laskowski	10,700	59	6	3	531	
Guidance - Mr. Amendolia	15,100	83	6	3	747	
Guidance - Mr. Wolan	14,400	80	6	3	720	
Guidance - Mr. Moran	12,400	68	6	3	<u>612</u>	
Total					\$3,987	
Average						\$1.99

4. Nonprofessional

<u>Name</u>	<u>Daily Salary</u>	<u>Health Days of Service</u>	<u>Attendance Days of Service</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
Mrs. Schilling	\$ 21.12	4	1	\$105.60	@ \$1,995
Mrs. Magenheimer	18.15	4	1	90.75	
Mrs. Mollarel	17.60	4	1	88.00	
Total				<u>\$284.35</u>	
Average					\$1.14

D. Summary

1. From B-1 Special Staff	\$ 19.40
2. Nonprofessional Service	18.23
3. From C-1 Typical Average Teacher Cost times per pupil periods	191.82
4. From C-2 Supplemental	1.32
5. From C-3 Other Professional	1.99
6. From C-4 Nonprofessional	.14
Total	<u>\$232.90</u>

Amount of
Days of
Number of

Salary
Rate

Rate

1	1	100.00
2	2	200.00
3	3	300.00
4	4	400.00
5	5	500.00
6	6	600.00
7	7	700.00
8	8	800.00
9	9	900.00
10	10	1000.00

Total

Amount

Amount of
Days of
Number of

Salary
Rate

Rate

1	1	100.00
2	2	200.00
3	3	300.00
4	4	400.00
5	5	500.00
6	6	600.00
7	7	700.00
8	8	800.00
9	9	900.00
10	10	1000.00

Total

Amount

Amount

Amount

Amount

Amount

Amount

Amount

Total

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Hicksville High School
Hicksville, New York

At Hicksville High School Erwin Rozran, administrative assistant was my host. Greetings and survey approval were received from Superintendent Don Abt. The high school principal, Raymond Rusch provided members of the staff to cooperate in establishing required data.

Four staff members were jointly interviewed. They represented four academic disciplines including mathematics, science, social studies and language with a range of experience. In addition two were department heads. From this sample time spent on mandated services by the typical teacher was projected.

Mr. Rozran and Mr. Rusch arranged for me to also interview the chairman of guidance and a nurse. Data on attendance and the secretarial services, together with salaries, were also provided to enable us to compute per pupil costs.

Students attended an average of 5.6 classes per day. There are 3150 students attending the school and a staff of 174.

Mississippi High School
Mississippi, New York

At Mississippi High School, the following administrative statistics
covering the entire school year covered the following
the high school principal, Raymond Hunt, provided records of the
records in maintaining records of the
from these records were fairly interesting. They were only
records of the school. Including information, including records of the
language of the school. In addition, the records were of the
the school records, the school records were of the school records
and records.
Mr. Horton and Mr. Hunt, however, for the school records of the
records of the school and a record of the school records and the
records, including all records, were provided in the school
and school records.
Students attended an average of 175 classes per day. These
students attended the school and a total of 175.

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Hicksville High School
Hicksville, New York

A. General

1. Number of students - 3150
2. Number of teachers - 174
3. Administration - 5

B. Staff-Percentage-Mandated Services

1. Professional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Superintendent - Abt	\$ 35,000	1%	\$ 350	@ 3150
Administrative Assistant - Rozran	24,000	25%	6,000	
High School Principal - Rusch	24,198	20%	4,839	
Assistant Principal - Burke	21,613	37%	7,996	
Assistant Principal - Olvany	21,041	37%	7,785	
Assistant Principal - Jaworski	21,613	37%	7,996	
Assistant Principal - Feign	21,613	37%	7,996	
Guidance				
Total	\$235,534	24%	\$56,528	
12 Counselors				
and Director				
Nurses (3)	39,424	50%	\$ 19,712	
Supervisor Barrison	18,797	12.5%	12,343	
Psychologist - D'Ambrosio	17,360	60%	10,416	
Speech - Ropichen	16,440	2.5%	4,110	
Director - Census & Attendance Center - Chittenden	11,500	7.5%	8,625	
Attendance Teacher - Mrs. Nemith	12,300	50%	6,150	
	Total		\$150,852	
	Average		\$47.88	

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2. Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
School Secretaries (6)	\$38,583	37%	\$14,275	@
ance Secretaries (5)	31,150	63%	19,624	3150
Director Secretary (1)	7,157	10%	715	
endance Secretary - Hartmen	4,304	7%	301	
endance Secretary - Buckstim	7,157	14%	1,001	
		Total	\$35,916	
		Average		\$11.40

Staff Per Diem - Mandated Services

1. Professional Sample

<u>Name</u>	<u>Salary</u>	<u>Daily \$180</u>	<u>Days of Service*</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
unningham	\$17,898	99.43	77	\$ 7,656	@130
McGinnis	16,415	91.19	84	7,659	@125
risiolo	12,420	69.00	77	5,313	@100
visi	9,376	52.08	87	4,530	@110
			Total	\$20,854	

Average:	Cunningham	\$ 58.89
	McGinnis	61.27
	Crisiolo	53.13
	Pavisi	41.18
Total Per Pupil Per Class		\$214.47
Average Per Pupil Per Class		53.61

ination, attendance and health records average of 5.6 classes per pupil \$300.21

2. Supplemental

BOCES - Service Attendance	\$2.00
BOCES - 70¢ for 1/3 of students	.23
Total	\$2.23

1. General Information
 2. Personnel
 3. Equipment
 4. Materials
 5. Methods
 6. Results
 7. Conclusions
 8. References
 9. Appendices
 10. Index
 11. Summary
 12. Abstract
 13. Notes
 14. Tables
 15. Figures
 16. Photographs
 17. Maps
 18. Diagrams
 19. Formulas
 20. Equations
 21. Derivations
 22. Proofs
 23. Calculations
 24. Measurements
 25. Observations
 26. Experiments
 27. Tests
 28. Analyses
 29. Syntheses
 30. Reactions
 31. Processes
 32. Procedures
 33. Techniques
 34. Methods
 35. Approaches
 36. Strategies
 37. Tactics
 38. Plans
 39. Schemes
 40. Diagrams
 41. Figures
 42. Tables
 43. Formulas
 44. Equations
 45. Derivations
 46. Proofs
 47. Calculations
 48. Measurements
 49. Observations
 50. Experiments
 51. Tests
 52. Analyses
 53. Syntheses
 54. Reactions
 55. Processes
 56. Procedures
 57. Techniques
 58. Methods
 59. Approaches
 60. Strategies
 61. Tactics
 62. Plans
 63. Schemes
 64. Diagrams
 65. Figures
 66. Tables
 67. Formulas
 68. Equations
 69. Derivations
 70. Proofs
 71. Calculations
 72. Measurements
 73. Observations
 74. Experiments
 75. Tests
 76. Analyses
 77. Syntheses
 78. Reactions
 79. Processes
 80. Procedures
 81. Techniques
 82. Methods
 83. Approaches
 84. Strategies
 85. Tactics
 86. Plans
 87. Schemes
 88. Diagrams
 89. Figures
 90. Tables
 91. Formulas
 92. Equations
 93. Derivations
 94. Proofs
 95. Calculations
 96. Measurements
 97. Observations
 98. Experiments
 99. Tests
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 3. Equipment
 4. Materials
 5. Methods
 6. Results
 7. Conclusions
 8. References
 9. Appendices
 10. Index
 11. Summary
 12. Abstract
 13. Notes
 14. Tables
 15. Figures
 16. Photographs
 17. Maps
 18. Diagrams
 19. Formulas
 20. Equations
 21. Derivations
 22. Proofs
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 27. Tests
 28. Analyses
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 35. Approaches
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 41. Figures
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 44. Equations
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 99. Tests
 100. Analyses

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Summary

From B-1 Professional Special Staff	\$ 47.88
Nonprofessional Services	11.40
From C-1 Typical Average Teacher Cost	
Times pupil periods	300.21
From C-2 Supplemental	2.23
Total	<u>\$361.72</u>

Principal - William Feign

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Chaminade High School
Mineola, New York

Brother Lawrence Oleksiak, Principal, welcomed me to Chaminade High School and was my host for the day. This private Catholic High School has a most unique program with a very selective male student body. The curriculum is rigorous and evidence of dedication and loyalty to a heavy work schedule abounds. The staff obviously gives unstintingly of time and talent. Accordingly, our data on time spent in evaluation which includes after-hour time seems skewed. However, it is realistic in comparison to other programs examined.

Four staff members were interviewed to establish a sample. Four disciplines were sampled including English, social studies, mathematics and language. Two were lay teachers and two were from the religious order. The principal, the assistant principal who also headed guidance, the dean of students also serving as assistant principal, the nurse and the attendance teacher were also interviewed. The principal provided cost data but via conference requested that names not be used in favor of a numbering system. We have abided by his request in this regard.

Students attend an inordinately high (7.8) number of classes per day on the average. A demanding curriculum. There are 1111 students enrolled and a staff of 60.

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Chaminade High School
Mincola, New York

Tabulation of Data

A. General

1. Number of students - 1111

2. Number of staff (Professional) - 60

B. Staff - Percentage - Mandated Services

1. Professional

<u>Name</u>	<u>Actual Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Administration #1	\$ 3,000	\$11,170	\$14,170	2.2%	\$ 311	@ 1111
Administration #2	3,000	11,170	14,170	25%	3,542	
Administration #3	15,572	--	15,572	67.5%	10,511	
Administration #4	3,000	9,025	12,025	25%	3,006	
Guidance #1	13,442	--	13,442	20%*	2,688	
Guidance #2	3,000	7,290	10,290	20%	2,058	
Guidance #3	11,084	--	11,084	20%	2,216	
Guidance #4	3,000	6,660	9,660	20%	1,932	
Guidance #5	3,000	7,920	10,920	20%	2,184	
Guidance #6	3,000	5,260	8,260	20%	1,652	
Guidance #7	3,000	4,280	7,280	20%	1,456	
Guidance #8	3,000	4,280	7,280	20%	1,456	
Course	9,606	--	9,606	50%	4,803	
			Total		\$37,815	
			Average			

40% of half time (50%) equals 20%

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Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
al Secretary	\$ 7,060	1%	\$ 70	@ 1111
ce Secretary	6,027	60%	3,616	
Secretary	6,888	10%	688	
nce Officer	6,027	100%	6,027	
nce Assistant	6,027	22.5%	1,356	
		Total	\$11,757	
		Average		\$10.58

aff - Per Diem-Mandated Services

Professional

<u>Name</u>	<u>Actual Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Daily +180</u>	<u>*Days of Service</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
#1	\$ 3,000	\$ 7,290	\$10,290				175
#2	18,292	--	18,292				160
#3	18,496	--	18,496				160
#4	3,000	6,660	9,660				145
#1				57	51	\$ 2,907	\$ 16.61
#2				101	136	13,736	85.85
#3				102	200	20,400	127.50
#4				53	142	7,526	51.90
					Total		\$281.86
							70.46
							\$549.58
Average - Per Pupil Per Class							
Average of 7.8 **classes per pupil							

tion, attendance and health
rick Stafford

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Supplemental

Report Card Service (VSI)

Per Pupil

\$14.75

Summary

From B-1 Special Staff \$ 34.03

From B-2 Nonprofessional 10.58

From C Typical Average Teacher Cost
Times pupil periods 549.58

From D Supplemental 1.75

Total **\$595.94**

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Mineola High School
Mineola, New York

I was greeted at Mineola High School by Ben Wallace, Superintendent of Schools. Superintendent Wallace explained that the administrative organization at Mineola High School was changed and in transition since the principal and one of the assistant principals has resigned last summer. Superintendent Wallace and his Assistant Superintendent, George Russo were heading the administrative high school staff. My host for the day was Eliot Spack, Coordinator of ES 70, who also serves in the administrative staff.

Four teachers representing mathematics, science, social studies and English were interviewed to secure an appropriate sample. In addition to Superintendent Wallace, we also interviewed Mr. Spack; Assistant Superintendent, Mr. Russo; Assistant Principal, Mr. Torre; the attendance staff assistant, Mr. Kranitz; PPS Director, Vito Merola and a nurse teacher.

Experimental Title III ESEA programs are in operation in the area of individualization of instruction and proper recognition for this project was taken. We found that the business office handles data processing in both attendance and report card evaluation records. Allowance was made for this service.

The average number of classes per pupil was low (5.2). One reason for this was the large number of students (some 1/6) on early dismissal, taking four or five subjects, and going to work experience. There are 1802 students enrolled and a staff of 119.

Mincola High School
Mincola, New York

Tabulation of Data

General

1. Number of students - 1802
2. Professional staff - 119
3. Half-time teachers - 2
4. Special teachers - part time - 3
5. Assistant Principal - 1

Staff - Percentage-Mandated Services

1. Professional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Superintendent - Ben Wallace*	\$34,000	10%	\$ 3,400	@ 1802
Assistant Superintendent - George Russo	26,487	35%	9,270	
Assistant Superintendent - L. Formica	30,250	3%	907	
Coordinator ES70 - Eliot Spack	21,007	50%	10,503	
Assistant Principal - Frank Torre	19,392	75%	14,544	
Director of Guidance - Vita Merola	19,105	40%	7,642	
Guidance - 5 full time	79,808	25%	19,952	
Guidance - 2 part time (50%)	30,530	12.5%	3,816	
Director Nurses (P.T. - N.S.)	18,213	5%	910	
Nurses (2)	20,765	30%	6,229	
Psychologist - Morton Wolitzer**	18,600	15%	2,790	
Speech - Hedy Adamsky***	9,138	2%	182	
Attendance - Wallace Kranitz	17,275	25%	4,318	
		Total	\$84,463	
		Average		\$46.87

*Serves as Acting Principal
80% in H.S. @ 25%
40% in H.S. @ 5%

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

10

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2. Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal's Secretary - Helen Mackay	\$ 8,289	10%	\$ 828	@ 180
Secretary - Emily Tschinkel	6,089	10%	608	
Records Secretary - Hazel Swistara	6,689	10%	668	
Records Secretary - Helen Tischler	7,189	60%	4,313	
Clerk - Eleanor Rager	1,836	90%	1,652	
Ext. Prin. Office - Julia Baer	4,487	75%	3,365	
Ext. Prin. Office - June Joseflery	3,500	75%	2,625	
Attendance Office - Jean Del Rossi	4,153	7.5%	311	
Attendance Office - Marcella Rochelle	7,189	7.5%	539	
Teaching Clerk - Ethel Ketchum	5,382	100%	5,382	
Special Studies Clerk - Dorothy Crimmins	2,280	100%	2,280	
		Total Average	\$25,571	\$14.19

3. Supplemental

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Business Manager - Sam Donato	\$20,690*	3%	\$ 620	@ @ 1802
Supervisor - Karen Donohue	6,926*	20%	1,385	
Clerk - Angelina La Montia	2,900*	15%	435	
		Total Average	\$ 2,440	\$1.35

Report cards and attendance

Item	Quantity	Unit Price	Total Price
1. 1000	1000	1.00	1000.00
2. 500	500	2.00	1000.00
3. 250	250	4.00	1000.00
4. 125	125	8.00	1000.00
5. 62.5	62.5	16.00	1000.00
6. 31.25	31.25	32.00	1000.00
7. 15.625	15.625	64.00	1000.00
8. 7.8125	7.8125	128.00	1000.00
9. 3.90625	3.90625	256.00	1000.00
10. 1.953125	1.953125	512.00	1000.00
11. 0.9765625	0.9765625	1024.00	1000.00
12. 0.48828125	0.48828125	2048.00	1000.00
13. 0.244140625	0.244140625	4096.00	1000.00
14. 0.1220703125	0.1220703125	8192.00	1000.00
15. 0.06103515625	0.06103515625	16384.00	1000.00
16. 0.030517578125	0.030517578125	32768.00	1000.00
17. 0.0152587890625	0.0152587890625	65536.00	1000.00
18. 0.00762939453125	0.00762939453125	131072.00	1000.00
19. 0.003814697265625	0.003814697265625	262144.00	1000.00
20. 0.0019073486328125	0.0019073486328125	524288.00	1000.00
21. 0.00095367431640625	0.00095367431640625	1048576.00	1000.00
22. 0.000476837158203125	0.000476837158203125	2097152.00	1000.00
23. 0.0002384185791015625	0.0002384185791015625	4194304.00	1000.00
24. 0.00011920928955078125	0.00011920928955078125	8388608.00	1000.00
25. 0.000059604644775390625	0.000059604644775390625	16777216.00	1000.00
26. 0.0000298023223876953125	0.0000298023223876953125	33554432.00	1000.00
27. 0.00001490116119384765625	0.00001490116119384765625	67108864.00	1000.00
28. 0.000007450580596923828125	0.000007450580596923828125	134217728.00	1000.00
29. 0.0000037252902984619140625	0.0000037252902984619140625	268435456.00	1000.00
30. 0.00000186264514923095703125	0.00000186264514923095703125	536870912.00	1000.00
31. 0.000000931322574615478515625	0.000000931322574615478515625	1073741824.00	1000.00
32. 0.0000004656612873077392578125	0.0000004656612873077392578125	2147483648.00	1000.00
33. 0.00000023283064365386962890625	0.00000023283064365386962890625	4294967296.00	1000.00
34. 0.000000116415321826934814453125	0.000000116415321826934814453125	8589934592.00	1000.00
35. 0.0000000582076609134674072265625	0.0000000582076609134674072265625	17179869184.00	1000.00
36. 0.00000002910383045673370361328125	0.00000002910383045673370361328125	34359738368.00	1000.00
37. 0.000000014551915228366851806640625	0.000000014551915228366851806640625	68719476736.00	1000.00
38. 0.0000000072759576141834259033203125	0.0000000072759576141834259033203125	137438953472.00	1000.00
39. 0.00000000363797880709171295166015625	0.00000000363797880709171295166015625	274877906944.00	1000.00
40. 0.000000001818989403545856475830078125	0.000000001818989403545856475830078125	549755813888.00	1000.00
41. 0.0000000009094947017729282379150390625	0.0000000009094947017729282379150390625	1099511627776.00	1000.00
42. 0.00000000045474735088646411895751953125	0.00000000045474735088646411895751953125	2199023255552.00	1000.00
43. 0.000000000227373675443232059478759765625	0.000000000227373675443232059478759765625	4398046511104.00	1000.00
44. 0.0000000001136868377216160297393798828125	0.0000000001136868377216160297393798828125	8796093022208.00	1000.00
45. 0.00000000005684341886080801486968994140625	0.00000000005684341886080801486968994140625	17592186044416.00	1000.00
46. 0.000000000028421709430404007434844970703125	0.000000000028421709430404007434844970703125	35184372088832.00	1000.00
47. 0.0000000000142108547152020037174224853515625	0.0000000000142108547152020037174224853515625	70368744177664.00	1000.00
48. 0.00000000000710542735760100185871124267578125	0.00000000000710542735760100185871124267578125	140737488355328.00	1000.00
49. 0.000000000003552713678800500929355621337890625	0.000000000003552713678800500929355621337890625	281474976710656.00	1000.00
50. 0.0000000000017763568394002500464778106689453125	0.0000000000017763568394002500464778106689453125	562949953421312.00	1000.00
51. 0.00000000000088817841970012502323890533447265625	0.00000000000088817841970012502323890533447265625	1125899906842624.00	1000.00
52. 0.000000000000444089209850062511619452667236328125	0.000000000000444089209850062511619452667236328125	2251799813685248.00	1000.00
53. 0.0000000000002220446049250312558097263336181640625	0.0000000000002220446049250312558097263336181640625	4503599627370496.00	1000.00
54. 0.00000000000011102230246251562790486316680908203125	0.00000000000011102230246251562790486316680908203125	9007199254740992.00	1000.00
55. 0.000000000000055511151231257813952431583404541015625	0.000000000000055511151231257813952431583404541015625	18014398509481984.00	1000.00
56. 0.0000000000000277555756156289069762157917022705078125	0.0000000000000277555756156289069762157917022705078125	36028797018963968.00	1000.00
57. 0.00000000000001387778780781445348810789585113525390625	0.00000000000001387778780781445348810789585113525390625	72057594037927936.00	1000.00
58. 0.000000000000006938893903907226744053947925567626953125	0.000000000000006938893903907226744053947925567626953125	144115188075855872.00	1000.00
59. 0.0000000000000034694469519536133720269739627838134765625	0.0000000000000034694469519536133720269739627838134765625	288230376151711744.00	1000.00
60. 0.00000000000000173472347597680668601348698139190673828125	0.00000000000000173472347597680668601348698139190673828125	576460752303423488.00	1000.00
61. 0.000000000000000867361737988403343006743490695953369140625	0.000000000000000867361737988403343006743490695953369140625	1152921504606846976.00	1000.00
62. 0.0000000000000004336808689942016715033717453479766845703125	0.0000000000000004336808689942016715033717453479766845703125	2305843009213693952.00	1000.00
63. 0.00000000000000021684043449710083575168587267398834228515625	0.00000000000000021684043449710083575168587267398834228515625	4611686018427387904.00	1000.00
64. 0.000000000000000108420217248550417875842936336994171142578125	0.000000000000000108420217248550417875842936336994171142578125	9223372036854775808.00	1000.00
65. 0.0000000000000000542101086242752089379214681684970855712890625	0.0000000000000000542101086242752089379214681684970855712890625	18446744073709551616.00	1000.00
66. 0.00000000000000002710505431213760446896073408424854278564453125	0.00000000000000002710505431213760446896073408424854278564453125	36893488147419103232.00	1000.00
67. 0.00000000000000001355252715606880223448036704212427139272265625	0.00000000000000001355252715606880223448036704212427139272265625	73786976294838206464.00	1000.00
68. 0.000000000000000006776263578034401117240183521062135696361328125	0.000000000000000006776263578034401117240183521062135696361328125	147573952589676412928.00	1000.00
69. 0.0000000000000000033881317890172005586200917605310678481806640625	0.0000000000000000033881317890172005586200917605310678481806640625	295147905179352825856.00	1000.00
70. 0.0000000000000000016940658945086002793100458802655339240903203125	0.0000000000000000016940658945086002793100458802655339240903203125	590295810358705651712.00	1000.00
71. 0.00000000000000000084703294725430013965500229441276696204516015625	0.00000000000000000084703294725430013965500229441276696204516015625	1180591620717411303424.00	1000.00
72. 0.000000000000000000423516473627150069827501147206383481022580078125	0.000000000000000000423516473627150069827501147206383481022580078125	2361183241434822606848.00	1000.00
73. 0.0000000000000000002117582368135750349137505736031917405112900390625	0.0000000000000000002117582368135750349137505736031917405112900390625	4722366482869645213696.00	1000.00
74. 0.00000000000000000010587911840678751745687528680159587025564501953125	0.00000000000000000010587911840678751745687528680159587025564501953125	9444732965739290427392.00	1000.00
75. 0.000000000000000000052939559203393758728437643400797935127822509765625	0.000000000000000000052939559203393758728437643400797935127822509765625	18889465931478580854784.00	1000.00
76. 0.0000000000000000000264697796016968793642188217003989675639112548828125	0.0000000000000000000264697796016968793642188217003989675639112548828125	37778931862957161709568.00	1000.00
77. 0.00000000000000000001323488980084843968210941085019948378195562744140625	0.00000000000000000001323488980084843968210941085019948378195562744140625	75557863725914323419136.00	1000.00
78. 0.000000000000000000006617444900424219841054705425099741890977813720703125	0.000000000000000000006617444900424219841054705425099741890977813720703125	151115727451828646838272.00	1000.00
79. 0.0000000000000000000033087224502121099205273527125498709454889068603515625	0.0000000000000000000033087224502121099205273527125498709454889068603515625	302231454903657293676544.00	1000.00
80. 0.00000000000000000000165436122510605496026367635627435472724445343017578125	0.00000000000000000000165436122510605496026367635627435472724445343017578125	604462909807314587353088.00	1000.00
81. 0.000000000000000000000827180612553027480131838178137177363622226715087890625	0.000000000000000000000827180612553027480131838178137177363622226715087890625	1208925819614629174706176.00	1000.00
82. 0.0000000000000000000004135903062765137400659190890685886818111133575439453125	0.0000000000000000000004135903062765137400659190890685886818111133575439453125	2417851639229258349412352.00	1000.00
83. 0.00000000000000000000020679515313825687003295954453429434090555667877197265625	0.00000000000000000000020679515313825687003295954453429434090555667877197265625	4835703278458516698824704.00	1000.00
84. 0.000000000000000000000103397576569128435016479772267147170452778339385986328125	0.000000000000000000000103397576569128435016479772267147170452778339385986328125	9671406556917033397649408.00	1000.00
85. 0.0000000000000000000000516987882845642175082398861335735852263891696929931640625	0.0000000000000000000000516987882845642175082398861335735852263891696929931640625	19342826227668133590598720.00	1000.00
86. 0.00000000000000000000002584939414228210875411994306678679263194458484649658203125	0.00000000000000000000002584939414228210875411994306678679263194458484649658203125	38685652455336267181197440.00	1000.00
87. 0.000000000000000000000012924697071141054377059971533393396315972292423248291015625	0.000000000000000000000012924697071141054377059971533393396315972292423248291015625	77371304910672534362394880.00	1000.00
88. 0.0000000000000000000000064623485355705271885299857666966981598611461616241455078125	0.0000000000000000000000064623485355705271885299857666966981598611461616241455078125	154742609821345068724789760.00	1000.00
89. 0.00000000000000000000000323117426778526359426499288334834907993057308081207275390625	0.00000000000000000000000323117426778526359426499288334834907993057308081207275390625	3	

<u>Name</u>	<u>Salary</u>	<u>Daily \$180</u>	<u>Days of Service*</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
David Poole	\$12,285	\$ 68	64		125
Robert Schmitt	11,320	62	78		125
Sally Healy	11,250	62	64		125
Connie Bentley	8,100	45	70		125
David Poole		68	64	\$ 43.52	\$ 34.81
Robert Schmitt		62	78	48.36	38.68
Sally Healy		62	64	39.68	31.74
Connie Bentley		45	70	31.50	25.20
			Total	<u>\$163.06</u>	<u>\$130.43</u>
			Average Per Pupil Per Class		32.60
			Average of 5.2** classes per pupil		169.52

D. Summary

1. From B-1 Special Staff	\$ 46.87
2. From B-2 Nonprofessional	14.19
3. From B-3 Supplemental	1.35
4. From C Typical Average Teacher Cost Times pupil periods	<u>169.52</u>
Total	\$231.93

* valuation, attendance and health per year.

**Mr. Vita Merola

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Corpus Christi Elementary School
Mineola, New York

Sister Louise Raah, Principal, welcomed me to the Corpus Christi Elementary School, Mineola, New York and served as my hostess for the day. This school of 859 students has a staff of 23 full time teachers and 2 part time employees. There is a program of educational departmentalization in grades four through eight.

I was able to interview one staff member from each grade level. Four were lay teachers and four were sisters of the participating religious community. I also interviewed the nurse and finally Sister Louise to secure data on the psychologist, the secretarial staff and general evaluation program, together with staff salaries. The psychologist served the school one day a week. During the day I also discussed the spirit of Chapter 138 of the Laws of 1970 with Father Thomas Murphy, Priest of the parish. It should be pointed out that the school enjoys good parent relations and has an intensive and effective program of volunteer assistants.

The first part of the book is a history of the school system in Chicago. It begins with a description of the early schools and the role of the church in education. It then discusses the growth of the public school system and the influence of various reformers. The second part of the book is a study of the Chicago school system in the early 20th century. It examines the role of the school in socialization and the influence of the city on the school. The third part of the book is a study of the Chicago school system in the late 20th century. It examines the role of the school in socialization and the influence of the city on the school. The fourth part of the book is a study of the Chicago school system in the early 21st century. It examines the role of the school in socialization and the influence of the city on the school.

Corpus Christi Elementary School
Mincola, New York

Tabulation of Data

A. General

1. Number of students	-	859
2. Number of staff	-	23
Part time	-	2

B. Staff - Percentage - Mandated Services

1. Professional

<u>Name</u>	<u>Actual Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal - Sister Louise Raah	\$ 2,400	\$ 6,200	\$ 8,600	27.5%	\$ 2,365	@ 859
Psychologist - Bruce Serhin	2,300		2,300	37.5%	862	
Nurse - Helen Johnson	11,400		11,400	75%	8,550	
			Total		\$11,777	
			Average Per Pupil			<u>\$13.7</u>

2. Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal's Secretary - Mrs. Cecilia Fleming	\$ 4,080	25%	\$ 1,020	@ 859
			Average Per Pupil	
				<u>\$1.18</u>

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Staff - Per Diem - Mandated Services

Professional Sample

<u>Name</u>	<u>Actual Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Daily +180</u>	<u>Days of Service</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
er Ann Marie	\$ 2,400	\$ 4,050	\$ 6,450	35	42	\$ 1,470	@37
or Braue	--	--	7,790	43	41	1,763	30
abeth Callison	--	--	6,450	35	50	1,750	36
e Feather	--	--	7,205	40	37	1,480	34
er Maria Dolorada	2,400	4,050	6,450	35	117	4,095	40
e Vinten	--	--	7,740	43	72	3,096	44
er Barbara Diradi	2,400	4,910	7,310	40	76	3,040	43
er Janet Edward	2,400	4,050	6,450	35	77	2,695	40
				Total		\$19,389	

<u>Name</u>	<u>Per Pupil Cost</u>
er Ann Marie	\$ 39.72
or Braue	58.76
abeth Callison	48.61
e Feather	43.52
er Maria Dolorada	102.37
Vinten	70.36
er Barbara Diradi	70.69
r Janet Edward	67.37
	<u>67.37</u>
Total	\$501.40
Average Per Pupil	<u>62.67</u>

Summary

1. From B-1 Special Staff	\$ 13.71
2. From B-2 Nonprofessional	1.18
3. From C Average Teacher	62.67
Total Per Pupil	77.56

[illegible]

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Willis Avenue Elementary School
Mineola, New York

Dr. Wiley Bowyer, Principal, greeted me at the Willis Avenue Elementary School and served as my host for the day. In the early discussion of Chapter 138, I met Dr. William Hautt, Administrative Assistant of the Superintendent of Schools and Patricia Esculish, learning specialist. Through the good offices of Dr. Bowyer, I was able to interview, in addition to the above, one teacher from each of the three levels of the nongraded instructional program in operation at the Willis Avenue Elementary School. I also interviewed the school nurse teacher and Audrey Roberts, a representative of the instructional aides. It should be pointed out that the instructional aides assume a good portion of the clerical chores involved in testing students. The nongraded program gave rise to a discussion of testing and the performance requirements of each instructional level were accepted as mandated services in the approved definition of evaluation. The psychologist serves the school two days a week (40%) and the Administrative Assistant an estimated ten percent of his time as central office representative.

There are 375 students enrolled in the school with a staff of 16 teachers.

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**Willis Avenue Elementary School
Mineola, New York**

Tabulation of Data

General

1. Number of students	-	375
2. Number of staff - administrators	-	1
learning specialist	-	1
teachers	-	16
other professional	-	2
part time	-	3

Staff - Percentage - Mandated Services

1. Professional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal - Wiley Bowyer	\$23,525	17.5%	\$ 4,116	@375
Learning Specialist - Patricia Esculish	10,500	87.5%	9,187	
Administrative Assistant - William Haultt	15,000	2.5%*	375	
Teacher - Katherine McGuigan	9,325	60%	5,595	
Psychologist - Franklyn Eliot	18,250	38%**	6,935	
		<u>Total</u>	<u>\$26,208</u>	
	<u>Average Per Pupil</u>			\$69.88

% of 10%

% of 40%

2. Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal's Secretary - Lucia White	\$ 5,686	5%	\$ 284	@375
Instructional Aide - Audrey Roberts	4,659	30%	1,397	
General Office Secretary - Jean King	3,420*	10%	342	
45 hours per week @\$2.50 per hr. - 40 wks.	4,500	70%	3,150	
		<u>Total</u>	<u>\$ 5,173</u>	
	<u>Average Per Pupil</u>			\$13.79

\$2.50 per week x 40 wks.

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C. Staff - Per Diem - Mandated Services

Professional Sample

<u>Name</u>	<u>Salary</u>	<u>Daily \$180</u>	<u>Days of Services</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
Virginia Stratar (Primary Level)	\$15,675	87	172	\$14,964	25
Barbara Trent (Middle Level)	9,500	52	204	10,608	25
Walter Bernstein (Upper Level)	10,470	58	64	<u>3,712</u>	25
			Total	\$29,284	
Virginia Stratar			172	\$14,964	\$ 598.56
Barbara Trent			204	10,608	424.32
Walter Bernstein			64	3,712	148.48
			Total		\$1,171.36
			Average Per Pupil		390.45

D. Summary

1. From B-1 Special Staff	\$ 69.88
2. From B-2 Nonprofessional	13.79
3. From C Average Teacher	<u>390.45</u>
Total	\$474.12

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Dutch Lane Elementary School
Bicksville, New York

Robert Whearty, principal, welcomed me to the Dutch Lane Elementary School and served as my host for the day. I interviewed Mr. Whearty, Assistant Principal, Mr. Fine, the guidance counselor, the principal's secretary and the nurse teacher. In addition, I interviewed a teacher from each of the grades 1-6 inclusive. Mr. Whearty provided me with salary data and information relative to the services of the school psychologist, who serves four days a week and the speech teachers who serve a total of three days weekly. There are 780 students and a staff of 28.

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Dutch Lane Elementary School
Hicksville, New York

Tabulation of Data

A. General

1. Number of students	-	780
2. Number of staff	-	
Principal	-	1
Asst. Principal	-	1
Guidance counselor	-	1 (Half time)
Psychologist	-	1 (80% of the time)
Speech teachers	-	2 (3 days a week)
Teachers	-	28

B. Staff - Percentage - Mandated Services

1. Professional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal - Robert Whearty	\$22,250	5%	\$ 1,112	@ 780
Asst. Principal - Sidney Fine	20,004	17.5%	3,500	
Guidance counselor - Martin Cohn	16,420	7.5% *	1,231	
Psychologist - Steven Botney	15,200	60% **	9,120	
Nurse - Johnsie Donovan	12,024	62.5%	7,515	
Speech Teacher - Astrida Silkaina	9,614	4%	384	
" " - Patricia Rose	9,200	2%	184	
		Total	\$23,046	
Average Per Pupil				\$29.54

15% x 50%

75% x 80%

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Continued

2. Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal's Secretary - Dorothy Gottlieb	\$5,500	20%	\$1,100	@ 780
" " - Vivian Sanders	6,300	20%	<u>1,200</u>	
		Total	\$2,360	
		Average Per Pupil		\$3.02

Staff - Per Diem Mandated Services

<u>Name</u>	<u>Salary</u>	<u>Daily •180</u>	<u>Days of Service</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
Spiselman	\$15,040	83	41	\$ 3,403	28
Mon Dahlhery	15,680	87	40	3,480	28
ry Smith	16,480	91	39	3,549	26
O'Toole	9,376	52	89	4,628	24
ma Spector	11,336	62	95	5,890	28
eline Wicksel	12,024	66	93	<u>6,138</u>	29
			Total	\$27,088	

<u>Name</u>	<u>Per Pupil Cost</u>
Spiselman	\$ 121.53
Mon Dahlhery	124.28
ry Smith	136.50
O'Toole	192.83
ma Spector	210.35
eline Wicksel	<u>211.65</u>
Total	\$ 997.14
Average Per Pupil	\$ 166.19

Summary

1. From B-1 Special Staff	\$ 29.54
2. From B-2 Nonprofessional	3.02
3. From C Average Teacher	<u>166.19</u>
Total Average Per Pupil	\$198.75

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Holy Family Elementary School
Hicksville, New York

In the absence of the principal, Sister Eileen McMahon, I was welcomed by Sister Patricia Mary, a second grade teacher, and Mrs. Alice Brennan, the principal's secretary. This elementary school houses 910 students and has a staff of twenty-three regular teachers, four special teachers, a nurse and the principal.

During the day I also had the opportunity to discuss Chapter 138 with Msgr. Martin O'Dea and the president of the lay advisory board of education, Thomas Maloney.

With the cooperation of Sister Patricia I was able to interview a teacher representative from each grade (1-8), the nurse and the secretary. The school has no guidance or psychological service. The school does have parent volunteers.

In the absence of the President, Mr. Woodrow Wilson, I was
informed by Mr. [Name] that a meeting would be held at
the White House, at 10 o'clock, on Monday, Nov. 15, 1915.
The meeting was held at the White House, at 10 o'clock, on
Monday, Nov. 15, 1915. The meeting was held at the White
House, at 10 o'clock, on Monday, Nov. 15, 1915.

During the day, I was in the office of the President, and
was with him until 10 o'clock, when he retired to his
apartment. I was with him until 10 o'clock, when he retired
to his apartment.

With the exception of a few minutes, I was with him
until 10 o'clock, when he retired to his apartment. I was
with him until 10 o'clock, when he retired to his apartment.
The meeting was held at the White House, at 10 o'clock, on
Monday, Nov. 15, 1915.

Holy Family Elementary School
Hicksville, New York

Tabulation of Data

General

1. Number of students	-	910
2. Number of staff	-	23
Specials	-	4
Nurse	-	1
Principal	-	1
(28 + principal)		

Staff - Percentage - Mandated Services

1. Professional

<u>Name</u>	<u>Actual Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal - Sister Eileen McMahon	\$ 2,400	\$ 4,587	\$ 6,987	22.5%	\$ 1,572	@ 910
Nurse - Miss Helen Herkin			11,400	75 %	<u>8,550</u>	
			Total		\$10,122	
			Average			<u>\$11.12</u>

2. Nonprofessional

<u>Name</u>	<u>Salary</u>	<u>Percent Salary</u>	<u>Net</u>	<u>Per Pupil Cost</u>
Principal's Secretary - Mrs. Alice Brennan	\$ 2,600	23%	\$ 650	@ 910
			Average	<u>\$.71</u>

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Staff - Per Diem Mandated Services

<u>Name</u>	<u>Actual Salary</u>	<u>Donated Salary</u>	<u>Total Salary</u>	<u>Daily \$180</u>	<u>Days of Services</u>	<u>Cost</u>	<u>Per Pupil Cost</u>
ter Jeanne	\$ 2,400	\$ 4,745	\$ 7,145	39	43	\$ 1,677	@40
es McGinness			7,955	44	45	1,980	32
nces McCormack			8,815	48	55	2,640	43
ryann Cary			6,665	37	49	1,813	44
lyann White			8,170	45	111	4,995	46
ter Margaret	2,400	5,175	7,575	42	110	4,620	45
nn Pribek			6,665	37	91	3,367	40
ter Kathleen	2,400	4,315	6,715	37	117	<u>4,329</u>	45
Total						\$25,421	

<u>Name</u>	<u>Per Pupil Cost</u>
ter Jeanne	\$ 41.92
es McGinness	61.87
nces McCormack	61.39
ryann Cary	41.20
lyann White	108.58
ter Margaret	102.66
nn Pribek	84.17
ter Kathleen	<u>96.20</u>
Total	\$597.99
Average	<u>74.74</u>

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Summary

From B-1 Special Staff \$ 11.12

From B-2 Nonprofessional .71

From C Average Teacher 74.74

Total Per Pupil \$ 86.57

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SUMMARY OF DATA

- High Schools -

For the purpose of further consideration and discussion, we summarize the results of our secondary school sample herewith:

Holy Trinity High	-	\$ 232.90
Hicksville High School	-	361.72*
Chaminade High School	-	595.94
Mineola High School	-	231.93*

It is obvious that the per pupil cost for test evaluation is substantially higher at Chaminade High School. However, this data is skewed for two reasons, primarily. The inordinately rigorous curriculum at Chaminade for select students, standing at 7.8 class periods per student, makes the per pupil per class cost much higher. Secondly, the staff gives unstintingly of their own professional time, making for long hours devoted to student evaluation. In terms of seven-hour days, this makes costs higher.

Generally, the public schools have more or extra professionals working in the area of mandated services. However, in the parochial school the teacher tends to give more hours of service. The salary schedule of staff in the public schools is higher and staff costs in mandated services tends to be higher accordingly. Costs at Mineola High School were affected by the plan for individualization of instruction wherein performance or accomplishment were evaluated more extensively. However, early dismissal of work experience students at Mineola High School and their four or five period schedule tended to reduce per pupil cost in mandated services.

Per pupil class loads at the nonpublic schools--Chaminade = 7.8 periods per day and Holy Trinity 6.8 were much higher than the public schools--Hicksville = 5.6 and Mineola 5.2. These cost extensions, therefore, tended to keep the nonpublic schools relatively high in spite of lower salaries.

*Average per pupil cost times average number of pupil class periods.

High School

For the purpose of further consideration and discussion, we have

the results of our research and analysis herewith.

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It is further noted that the results of our research and analysis are as follows:

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20. The results of our research and analysis are as follows:

The average hours of service in the professional sample for mandated services was:

Holy Trinity High School	-	91 hours per child per year
Hicksville High School	-	65
Chaminade High School	-	154
Mineola High School	-	80

Again, we note the long hours of service by staff at Chaminade and Holy Trinity. The individualization of instruction and careful checks on attendance gave impetus to hours of service in the mandated area for Mineola High School.

The value of professional service computed by determining per diem remuneration computed as a seven hour day has been used but obviously does not reflect actual expenditure since religious educators donate large percentages of their equivalent salaries. In addition, all teachers give time after school, evenings or weekends as a part of their total professional service. This service does not generate additional compensation over that which the teacher would receive in a normal work day determined by check-in and check-out time, generally a seven hour day.

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SUMMARY OF DATE

- Elementary Schools -

We summarize the results of our elementary school sample herewith:

Corpus Christi Elementary School	-	\$ 774.56
Willis Avenue Elementary School	-	474.12
Holy Family Elementary School	-	86.57
Dutch Lane Elementary School	-	198.75

One quickly notes the similarity of costs in the nonpublic schools and the disparity between nonpublic schools and public schools. Also, we note the unusually high costs at Willis Avenue. The quick answer to costs at Willis Avenue Elementary School is twofold. First the small enrollment at the school (i.e., 375) disproportionately increases costs. Secondly, the control staff is a costly item, especially when combined with the nongraded program of instruction which devotes more time--on an individual basis--to evaluation.

The average hours of service in the professional sample for mandated service was:

Corpus Christi Elementary School	-	64
Willis Avenue Elementary School	-	147
Holy Family Elementary School	-	78
Dutch Lane Elementary School	-	66

Here we get a much more comparable result of average teacher time devoted to mandated services. Again Willis Avenue Elementary School is inordinately high. It is reasoned the evaluation of students for the nongraded program, largely individualized and time consuming, is the basic reason. In all fairness we must point out the devotion of the teachers to the innovative plan and the hours spent in pupil evaluation.

Summary of Data

Elementary School

Grade 1	100
Grade 2	100
Grade 3	100
Grade 4	100
Grade 5	100
Grade 6	100

One of the main purposes of this study was to determine the effect of the various factors mentioned above on the results of the tests. The results of the tests are given in the following table. The results show that the effect of the various factors mentioned above on the results of the tests is not significant. The results also show that the effect of the various factors mentioned above on the results of the tests is not significant.

The average score for the entire group was 75. The average score for the elementary school was 75. The average score for the high school was 75. The average score for the college was 75.

Grade 1	100
Grade 2	100
Grade 3	100
Grade 4	100
Grade 5	100
Grade 6	100

FIELD SURVEY LIMITATIONS

- Comment -

✓ While we have delimited the survey quite extensively in part two, there are some further limitations which need to be mentioned.

1. First a survey of only eight schools is in itself insufficient to warrant drawing compelling conclusions. This survey is but a sample of eight schools in Nassau County.
2. The schools selected were all in Nassau County. Any statewide inferences from data selected from one wealthy county could well be erroneous.
3. The type of school selected generates for us interesting results which were not necessarily typical. For example, Chaminade, a private, selective Catholic high school, is quite unique and not necessarily typical.
- ✓ 4. As noted previously, time given by the professional staff to handle mandated services, especially testing, was often during out-of-school or after hours. No attempt has been made here to categorize time as "in-school" or "out-of-school" time. Largely this was part of professional expectancy but varies with individual teachers. Consequently, when this time is equated to a seven hour professional day at the salary paid the teacher, seemingly skewed results occur. However, in total it represents service to students within the mandated service expectancy.

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5. Again, I note that costs for building, service, supplies, etc. have not been included. It is my understanding that these factors are being dealt with separately by other staff personnel.
6. While Chapter 138 covers assistance for examination and inspection, it also notes, "and through other activities" which tend to leave survey parameters sketchy or without precise definition. As pointed out previously, we have used "testing" as the parameter for evaluation. At times even testing became difficult to define. We included time for test preparation, administration, correction and follow up, since this all represented professional time for testing. We did not include time for evaluation unless it contained the tool and mechanic of test and recording. Obviously, there are numerous subtle services contained in the definition of evaluation but not included herewith.
7. It is also pointed out once again that costs for the nonpublic schools, include the factor of donated service by members of the several religious communities involved. If these salaries were taken as actual remuneration, costs would be less, but in the opinion of the writer, they represent professional service to the students and such donated or equated service should be included in cost comparisons.

CONCLUSION

Without hesitation we can clearly point out that all schools sampled expend substantially more for mandated services than the State formula of reimbursement represents in assistance for the nonpublic schools, i.e., \$27 maximum for an elementary child and \$45 maximum for a secondary child. This leaves open for deliberation the possible increase in the provisions of Chapter 138. At the same time more precise verbiage in the law itself could either restrict or liberalize assistance. All of this, of course, is for staff service and not for buildings, equipment, supplies, etc.

This field survey gives limited data with restricted accuracy. More precise figures from the State generally would require much more time and inspection of many more schools either by questionnaire or staff visit over a wide geographical area or all representative areas.

BUREAU OF EDUCATIONAL STUDIES AND SERVICES
HOFSTRA UNIVERSITY
HEMPSTEAD, NEW YORK

REPORT SURVEY OF MANDATED SCHOOL SERVICES
FOR FIVE SELECTED PAROCHIAL SCHOOLS

February 23, 1971

*Consultant: Dr. John L. Miller
Great Neck, New York*

BACKGROUND

The 1970 session of the New York State Legislature enacted legislation providing for state aid for non-public schools for "expenses of services for examination and inspection in connection with administration, grading, and the compiling and the reporting of results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." In order to obtain information on the services and estimates of their costs, Dr. Thomas Heath, Coordinator for Non-Public School Services of the State Education Department, engaged the Bureau of Educational Studies and Services of Hofstra University to survey five selected parochial schools, four in the Borough of Queens in New York City and one in Great Neck. The Bureau, in turn, engaged this investigator to make the survey and to prepare a report of the information obtained.

Interviews were held with teachers and the principal in each of the following schools which were designated by Dr. Heath:

St. Catherine of Sienna, 118-34 Riverton St., St. Albans, New York,
New York

Immaculate Conception, 179-14 Dalmy Road, Jamaica, New York

The Woodhull Prep & Day School, 196-10 Woodhull Ave., Hollis, N.Y.

Grace Lutheran School, 100-05 Springfield Blvd., New York, N.Y.

North Shore Hebrew Academy, 26 Old Mill Road, Great Neck, N.Y.

INTERVIEWING INSTRUMENT

In order to assure a reasonable degree of accuracy and reliability, interview guides were developed and used. This guide was in fact an adaptation of a guide prepared by Dr. Heath. It sought to secure information as to the number of days (or parts of days) spent in testing, in reporting to the State Education Department, and in the maintenance of pupil attendance and health records. Information was likewise secured as to the salaries of the third and sixth grade teachers interviewed.

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SUMMARY

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1. It appears from the information accumulated that the teachers in the schools surveyed devoted an average of 10 school days per year to mandated services (PEP, BEDS, Attendance, etc.) and 52.4 days per year to testing (preparation, administration, marking, recording, etc.)
 2. It appears that the average annual salary of teachers in the schools visited is \$6230. This figure assumes the addition of the value of "donated services" (approximately \$8600 per teacher) to the actual salary of the teaching nun.
 3. If one assumes a teacher-work-year of 1080 hours (6 hours per day for 180 days) one arrives at an average cost per teacher per day of \$11.80 or \$2134.00 year.
 4. It appears from the information reported that the typical administrator spends 19 days per year in overseeing the testing program and in the preparation of various reports. An estimate of the cost per administrator is \$1446 per year.
 5. It appears that the average per-pupil cost of the various services studied is ~~\$82.50~~ per year. *Ch. 138 = \$ 27.00*
 6. It appears to this observer that the testing program is substantial, especially in the Roman Catholic parochial schools; that teacher tests and achievement tests are effectively used as instruments of diagnosis and prognosis; and that intelligence test results are used effectively for grouping procedures in the large schools.

OBSERVATIONS

1. In developing the "Summary for the School" the investigator averaged the time spent by interviewees and extended the figure to include the total teaching faculty.
2. To arrive at the average daily salary per teacher, the average annual salary was divided by the number of days in the school year.
3. The figures for St. Catherine of Sienna do not reflect the cost (\$2000) of the salary of a teaching nun who serves as a full-time testing coordinator.

It is not the purpose of this report to discuss the various
aspects of the problem, but to present a summary of the
work done during the year. The work was done in the
laboratory of the Department of Agriculture, and the
results are presented in the following tables.

The first table shows the results of the work done
during the year. The second table shows the results
of the work done during the year. The third table
shows the results of the work done during the year.

The fourth table shows the results of the work done
during the year. The fifth table shows the results
of the work done during the year. The sixth table
shows the results of the work done during the year.

The seventh table shows the results of the work done
during the year. The eighth table shows the results
of the work done during the year. The ninth table
shows the results of the work done during the year.

The tenth table shows the results of the work done
during the year. The eleventh table shows the results
of the work done during the year. The twelfth table
shows the results of the work done during the year.

The thirteenth table shows the results of the work done
during the year. The fourteenth table shows the results
of the work done during the year. The fifteenth table
shows the results of the work done during the year.

The sixteenth table shows the results of the work done
during the year. The seventeenth table shows the results
of the work done during the year. The eighteenth table
shows the results of the work done during the year.

The nineteenth table shows the results of the work done
during the year. The twentieth table shows the results
of the work done during the year. The twenty-first table
shows the results of the work done during the year.

The twenty-second table shows the results of the work done
during the year. The twenty-third table shows the results
of the work done during the year. The twenty-fourth table
shows the results of the work done during the year.

February 24, 1971

4. The figures for North Shore Hebrew Academy appear to be lower than actual costs, the reason being that the unduly long school day includes considerable time for religious instruction.
5. The investigator realizes that translation of out-of-school hours into school days inflates the number of days and likewise the cost of the service, because teachers are not given extra compensation for out of school time. Nevertheless, the value of the out-of-school service is apparent.

Completed Interview Guides enclosed.

John L. Miller
Consultant for
The Bureau of Educational
Studies and Services

The American for health care is not a new thing. It is as old as the hills. The reason for this is that we have a long and rich history of health care. This is the reason why we have a health care system that is the envy of the world.

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and information is enclosed.

John J. White
Secretary
The American for Health
Care and Justice

INTERVIEW SCHEDULE

FOR SURVEY OF MANDATED SERVICES

ADMINISTRATIVE SCHEDULE

Date Feb. 18, 1991

Name of School North Shore Hebrew Academy

Address of School 16 Old Mill Rd, Great Neck

School Telephone Number 718-466-1111

Name of Principal David Nathan Horowitz

Name of Person Interviewed Same

Number of Classroom Teachers 13 Average Annual Salary of Lay Teachers \$52,000

Total Number of Pupils 260 No. on Full Session 200 No. on Part Session 60

Number of Classroom Teachers 13 Average Salary of Lay Teachers \$52,000

Number days school in session annually 171 Length of School Day 7 1/2 hours

Length of Part-Time School Day

Amount of administrative time spent annually
on the following services and the costs:
(Reported in full days and tenths of days (e.g. 1.2))

	Time (Days)	Cost
1. State Pupil Evaluation Program (PEP)	1.5	
2. State Basic Educational Data System (BEDS)	2	
3. Pupil Attendance Reports	2	
4. Other: Specify		
TOTALS	5.5	

Summary For The School

Total administrative time and cost

No. Days 5.5 Cost \$605

Total teacher time for mandated services

No. Days 40.6 Cost 1171

Total teacher time on school tests

No. Days 234 Cost 6716

TOTALS

No. Days 280.1 Cost 7492

Annual time and cost per pupil

No. Days Cost 942.46

COPY BOUND CLOSE TO EDGE

Date Feb. 18, 1971

Name of School

North Shore Hebrew Academy

Address of School _____

Salary: Actual \$3500 Donated Services _____ Total Salary _____

Name of Teacher

Karen Spierer

Grade

6

No. Yrs. Teaching Exp. _____

Amount of Teacher's Time spent annually
on the following mandates services:
(Reported in full days and tenths of days (e.g. 1.2))

1. Administration of State Pupil Evaluation Program (PEP)
2. Completion of Basic Educational Data System Forms (BEDS)
3. Pupil attendance records and reports
4. Pupil health records and reports

Time Out Of School (days)	Time In School (days)	Total Time Annually (days)
.25	.5	.75
	2.25	2.25
TOTALS	.25	2.75
		3.00

Amount of Teacher's Time spent annually
on the following school testing program:
(Reported in full days and tenths e.g. 1.2)

1. Teacher-made tests (describe

Scanned
English
Social Studies

2. Commercially Purchased Tests (list)

Metropolitan Achievement

3. Prepared textbook tests - end of chapter, etc. (list)

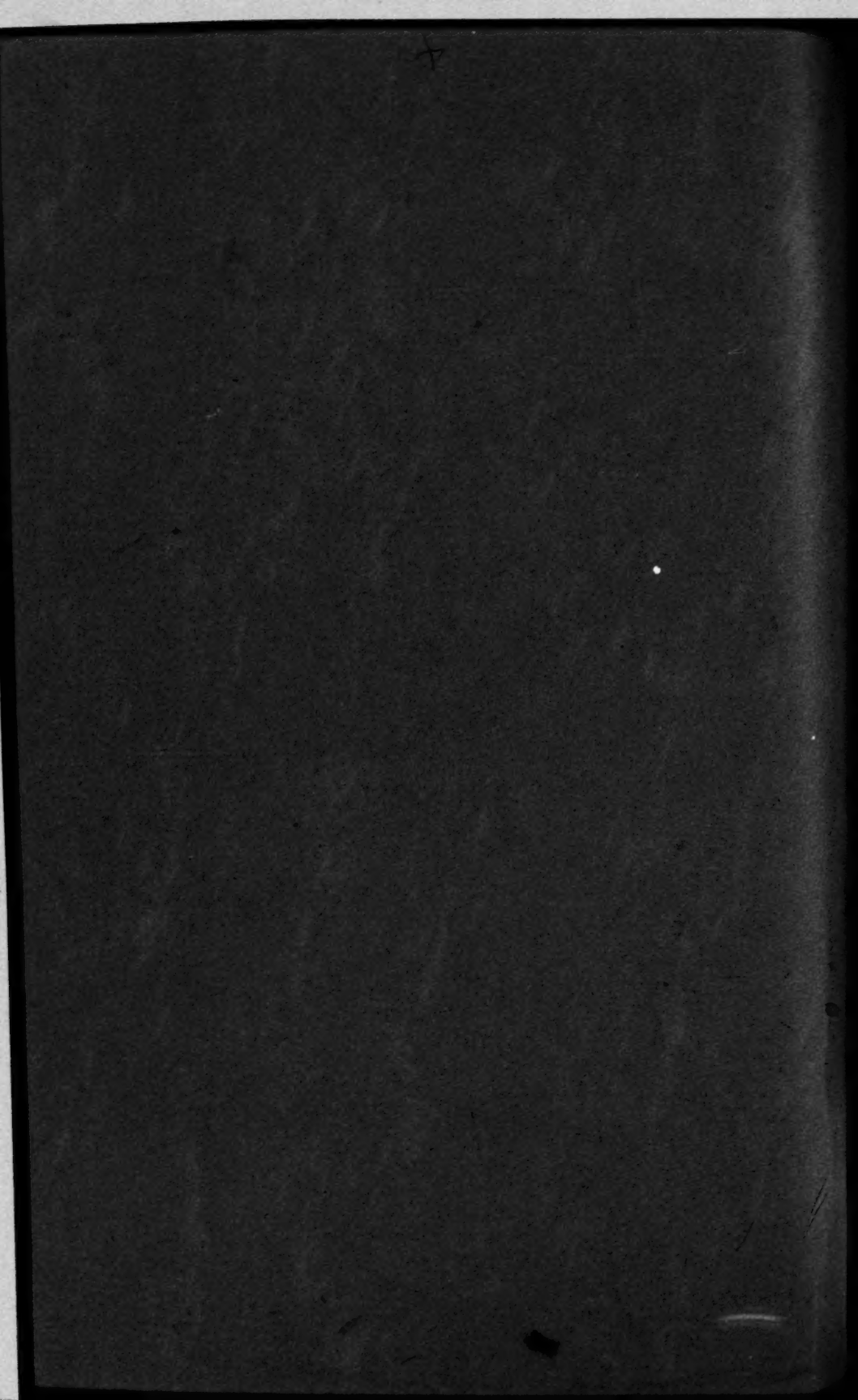
Time Out Of School For Preparation, Marking and Recording (days)	Time In School For Administration Supervision Marking and Recording (days)	Total Time (days)
10	8	18
1	.5	1.5
TOTALS	11	85
		195

SAMPLE

Totals

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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EXHIBIT E

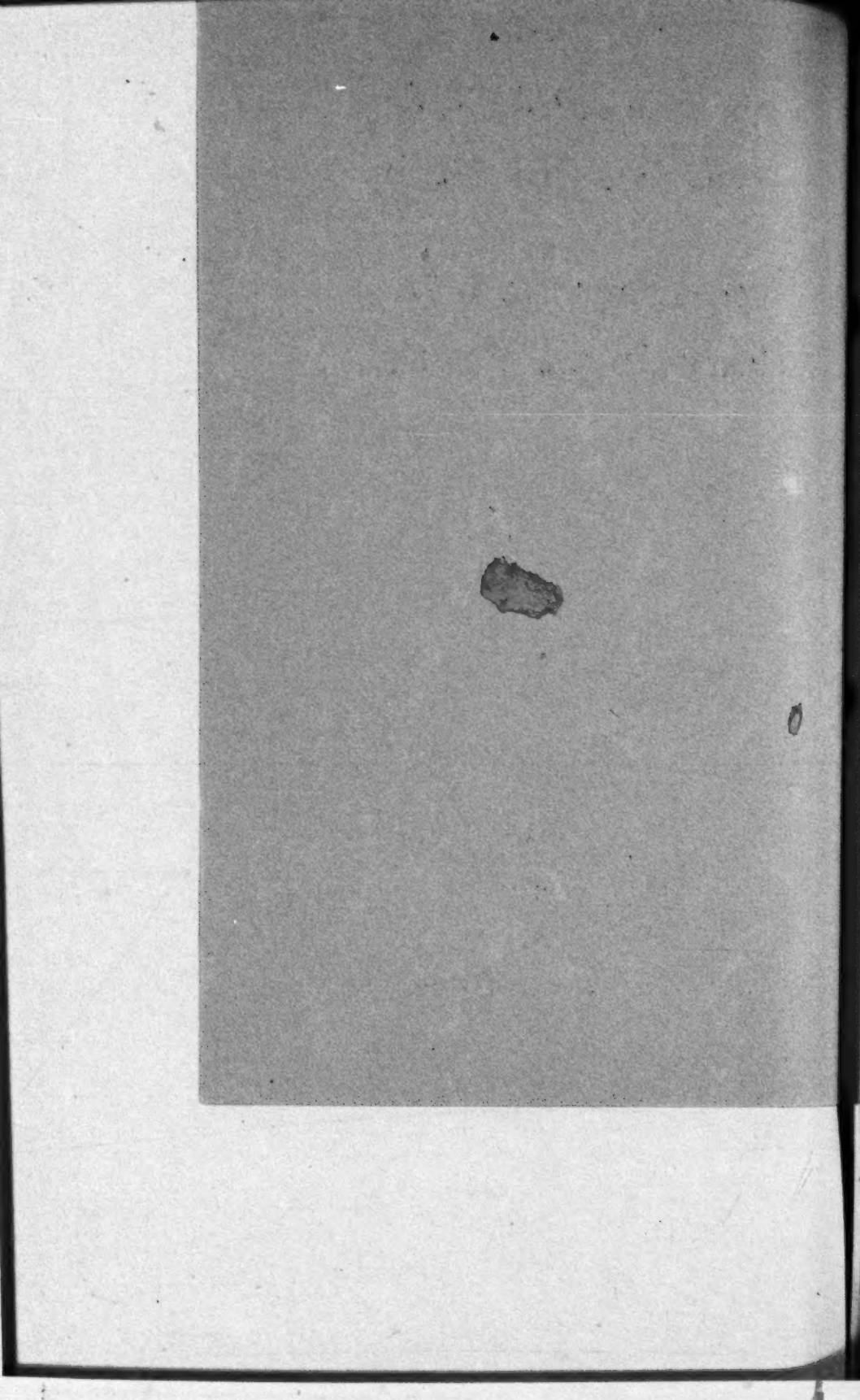


LAW REGULATIONS AND GUIDELINES

Apportionment to Nonpublic Schools

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Albany, New York 12224
August, 1970

EXHIBIT E



LAW REGULATIONS AND GUIDELINES

Apportionment to Nonpublic Schools

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Albany, New York 12224
August, 1970

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of the University (with years when terms expire)

1984	JOSEPH W. MCGOVERN, A.B., LL.B., L.H.D., LL.D., D.C.L., Chancellor	New York
1985	EVERETT J. PENNY, B.C.S., D.C.S. Vice Chancellor	White Plains
1978	ALEXANDER J. ALLAN, JR., LL.D., Litt.D.	Troy
1973	CHARLES W. MILLARD, JR., A.B., LL.D., L.H.D.	Buffalo
1972	CARL H. PFORZHEIMER, JR., A.B., M.B.A., D.C.S., H.H.D.	Purchase
1975	EDWARD M. M. WARBURG, B.S., L.H.D.	New York
1977	JOSEPH T. KING, LL.B.	Queens
1974	JOSEPH C. INDELICATO, M.D.	Brooklyn
1976	MRS. HELEN B. POWER, A.B., Litt.D., L.H.D.	Rochester
1979	FRANCIS W. MCGINLEY, B.S., LL.B., LL.D.	Glens Falls
1980	MAX J. RUBIN, LL.B., L.H.D.	New York
1971	KENNETH B. CLARK, A.B., M.S., Ph.D., Litt.D.	Hastings on Hudson
1982	STEPHEN K. BAILEY, A.B., B.A., M.A., Ph.D., LL.D.	Syracuse
1983	HAROLD E. NEWCOMB, B.A.	Owego
1981	THEODORE M. BLACK, A.B.	Sands Point

President of the University and Commissioner of Education
EWALD B. NYQUIST

Executive Deputy Commissioner of Education
GORDON M. AMBACH

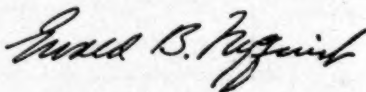
FOREWORD

Chapter 138 of the Laws of 1970 provides for the apportionment of state funds to qualifying nonpublic schools for expenses of services rendered by such schools in connection with examination and inspection.

In providing state funds for this purpose, the Legislature has recognized that the education of the children of the state is a matter of paramount state concern, and that the state has the duty and authority to insure through examination and inspection and by other means, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the Education Law and are maintaining levels of achievement which will adequately prepare them, within their capabilities, for the challenges of American life in the last decades of the twentieth century.

This document consists of three parts: (1) excerpts from the State Education Law pertaining to aid to nonpublic schools; (2) pertinent Regents Rules and Commissioner's Regulations; and (3) administrative guidelines. It is designed to assist nonpublic school authorities to comply with the law.

The assistance of public and nonpublic school officials in planning for the administration of the law and in carrying it out is greatly appreciated.



EWALD B. NYQUIST
Commissioner of Education

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Relevant Statutory Provisions

CONTENTS

	PAGE
Foreword	iii
Chapter 138 of the Laws of 1970.....	1
Other Relevant Statutory Provisions.....	5
Rules of the Board of Regents.....	30
Regulations of the Commissioner of Education.....	31
Definitions and Guidelines	
I. Definitions	34
II. Criteria for appointment	37
III. Directions for completing application for nonpublic school apportionment	39
IV. Directions for completing nonpublic school apportionment worksheet	40
V. Payment of apportionment	41

CONTENTS

Page	
1	Introduction
2	Chapter I. The Law of 1900
3	Chapter II. The Law of 1901
4	Chapter III. The Law of 1902
5	Chapter IV. The Law of 1903
6	Chapter V. The Law of 1904
7	Chapter VI. The Law of 1905
8	Chapter VII. The Law of 1906
9	Chapter VIII. The Law of 1907
10	Chapter IX. The Law of 1908
11	Chapter X. The Law of 1909
12	Chapter XI. The Law of 1910
13	Chapter XII. The Law of 1911
14	Chapter XIII. The Law of 1912
15	Chapter XIV. The Law of 1913
16	Chapter XV. The Law of 1914
17	Chapter XVI. The Law of 1915
18	Chapter XVII. The Law of 1916
19	Chapter XVIII. The Law of 1917
20	Chapter XIX. The Law of 1918
21	Chapter XX. The Law of 1919
22	Chapter XXI. The Law of 1920
23	Chapter XXII. The Law of 1921
24	Chapter XXIII. The Law of 1922
25	Chapter XXIV. The Law of 1923
26	Chapter XXV. The Law of 1924
27	Chapter XXVI. The Law of 1925
28	Chapter XXVII. The Law of 1926
29	Chapter XXVIII. The Law of 1927
30	Chapter XXIX. The Law of 1928
31	Chapter XXX. The Law of 1929
32	Chapter XXXI. The Law of 1930
33	Chapter XXXII. The Law of 1931
34	Chapter XXXIII. The Law of 1932
35	Chapter XXXIV. The Law of 1933
36	Chapter XXXV. The Law of 1934
37	Chapter XXXVI. The Law of 1935
38	Chapter XXXVII. The Law of 1936
39	Chapter XXXVIII. The Law of 1937
40	Chapter XXXIX. The Law of 1938
41	Chapter XL. The Law of 1939
42	Chapter XLI. The Law of 1940
43	Chapter XLII. The Law of 1941
44	Chapter XLIII. The Law of 1942
45	Chapter XLIV. The Law of 1943
46	Chapter XLV. The Law of 1944
47	Chapter XLVI. The Law of 1945
48	Chapter XLVII. The Law of 1946
49	Chapter XLVIII. The Law of 1947
50	Chapter XLIX. The Law of 1948
51	Chapter L. The Law of 1949
52	Chapter LI. The Law of 1950
53	Chapter LII. The Law of 1951
54	Chapter LIII. The Law of 1952
55	Chapter LIV. The Law of 1953
56	Chapter LV. The Law of 1954
57	Chapter LVI. The Law of 1955
58	Chapter LVII. The Law of 1956
59	Chapter LVIII. The Law of 1957
60	Chapter LIX. The Law of 1958
61	Chapter LX. The Law of 1959
62	Chapter LXI. The Law of 1960
63	Chapter LXII. The Law of 1961
64	Chapter LXIII. The Law of 1962
65	Chapter LXIV. The Law of 1963
66	Chapter LXV. The Law of 1964
67	Chapter LXVI. The Law of 1965
68	Chapter LXVII. The Law of 1966
69	Chapter LXVIII. The Law of 1967
70	Chapter LXIX. The Law of 1968
71	Chapter LXX. The Law of 1969
72	Chapter LXXI. The Law of 1970
73	Chapter LXXII. The Law of 1971
74	Chapter LXXIII. The Law of 1972
75	Chapter LXXIV. The Law of 1973
76	Chapter LXXV. The Law of 1974
77	Chapter LXXVI. The Law of 1975
78	Chapter LXXVII. The Law of 1976
79	Chapter LXXVIII. The Law of 1977
80	Chapter LXXIX. The Law of 1978
81	Chapter LXXX. The Law of 1979
82	Chapter LXXXI. The Law of 1980
83	Chapter LXXXII. The Law of 1981
84	Chapter LXXXIII. The Law of 1982
85	Chapter LXXXIV. The Law of 1983
86	Chapter LXXXV. The Law of 1984
87	Chapter LXXXVI. The Law of 1985
88	Chapter LXXXVII. The Law of 1986
89	Chapter LXXXVIII. The Law of 1987
90	Chapter LXXXIX. The Law of 1988
91	Chapter LXXXX. The Law of 1989
92	Chapter LXXXXI. The Law of 1990
93	Chapter LXXXXII. The Law of 1991
94	Chapter LXXXXIII. The Law of 1992
95	Chapter LXXXXIV. The Law of 1993
96	Chapter LXXXXV. The Law of 1994
97	Chapter LXXXXVI. The Law of 1995
98	Chapter LXXXXVII. The Law of 1996
99	Chapter LXXXXVIII. The Law of 1997
100	Chapter LXXXXIX. The Law of 1998
101	Chapter LXXXXX. The Law of 1999
102	Chapter LXXXXXI. The Law of 2000
103	Chapter LXXXXXII. The Law of 2001
104	Chapter LXXXXXIII. The Law of 2002
105	Chapter LXXXXXIV. The Law of 2003
106	Chapter LXXXXXV. The Law of 2004
107	Chapter LXXXXXVI. The Law of 2005
108	Chapter LXXXXXVII. The Law of 2006
109	Chapter LXXXXXVIII. The Law of 2007
110	Chapter LXXXXXIX. The Law of 2008
111	Chapter LXXXXXX. The Law of 2009
112	Chapter LXXXXXXI. The Law of 2010
113	Chapter LXXXXXXII. The Law of 2011
114	Chapter LXXXXXXIII. The Law of 2012
115	Chapter LXXXXXXIV. The Law of 2013
116	Chapter LXXXXXXV. The Law of 2014
117	Chapter LXXXXXXVI. The Law of 2015
118	Chapter LXXXXXXVII. The Law of 2016
119	Chapter LXXXXXXVIII. The Law of 2017
120	Chapter LXXXXXXIX. The Law of 2018
121	Chapter LXXXXXXX. The Law of 2019
122	Chapter LXXXXXXXI. The Law of 2020
123	Chapter LXXXXXXXII. The Law of 2021
124	Chapter LXXXXXXXIII. The Law of 2022
125	Chapter LXXXXXXXIV. The Law of 2023
126	Chapter LXXXXXXXV. The Law of 2024
127	Chapter LXXXXXXXVI. The Law of 2025
128	Chapter LXXXXXXXVII. The Law of 2026
129	Chapter LXXXXXXXVIII. The Law of 2027
130	Chapter LXXXXXXXIX. The Law of 2028
131	Chapter LXXXXXXXX. The Law of 2029
132	Chapter LXXXXXXXXI. The Law of 2030
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134	Chapter LXXXXXXXIII. The Law of 2032
135	Chapter LXXXXXXXIV. The Law of 2033
136	Chapter LXXXXXXXV. The Law of 2034
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139	Chapter LXXXXXXXVIII. The Law of 2037
140	Chapter LXXXXXXXIX. The Law of 2038
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142	Chapter LXXXXXXXXI. The Law of 2040
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145	Chapter LXXXXXXXIV. The Law of 2043
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148	Chapter LXXXXXXXVII. The Law of 2046
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151	Chapter LXXXXXXXX. The Law of 2049
152	Chapter LXXXXXXXXI. The Law of 2050
153	Chapter LXXXXXXXII. The Law of 2051
154	Chapter LXXXXXXXIII. The Law of 2052
155	Chapter LXXXXXXXIV. The Law of 2053
156	Chapter LXXXXXXXV. The Law of 2054
157	Chapter LXXXXXXXVI. The Law of 2055
158	Chapter LXXXXXXXVII. The Law of 2056
159	Chapter LXXXXXXXVIII. The Law of 2057
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166	Chapter LXXXXXXXV. The Law of 2064
167	Chapter LXXXXXXXVI. The Law of 2065
168	Chapter LXXXXXXXVII. The Law of 2066
169	Chapter LXXXXXXXVIII. The Law of 2067
170	Chapter LXXXXXXXIX. The Law of 2068
171	Chapter LXXXXXXXX. The Law of 2069
172	Chapter LXXXXXXXXI. The Law of 2070
173	Chapter LXXXXXXXII. The Law of 2071
174	Chapter LXXXXXXXIII. The Law of 2072
175	Chapter LXXXXXXXIV. The Law of 2073
176	Chapter LXXXXXXXV. The Law of 2074
177	Chapter LXXXXXXXVI. The Law of 2075
178	Chapter LXXXXXXXVII. The Law of 2076
179	Chapter LXXXXXXXVIII. The Law of 2077
180	Chapter LXXXXXXXIX. The Law of 2078
181	Chapter LXXXXXXXX. The Law of 2079
182	Chapter LXXXXXXXXI. The Law of 2080
183	Chapter LXXXXXXXII. The Law of 2081
184	Chapter LXXXXXXXIII. The Law of 2082
185	Chapter LXXXXXXXIV. The Law of 2083
186	Chapter LXXXXXXXV. The Law of 2084
187	Chapter LXXXXXXXVI. The Law of 2085
188	Chapter LXXXXXXXVII. The Law of 2086
189	Chapter LXXXXXXXVIII. The Law of 2087
190	Chapter LXXXXXXXIX. The Law of 2088
191	Chapter LXXXXXXXX. The Law of 2089
192	Chapter LXXXXXXXXI. The Law of 2090
193	Chapter LXXXXXXXII. The Law of 2091
194	Chapter LXXXXXXXIII. The Law of 2092
195	Chapter LXXXXXXXIV. The Law of 2093
196	Chapter LXXXXXXXV. The Law of 2094
197	Chapter LXXXXXXXVI. The Law of 2095
198	Chapter LXXXXXXXVII. The Law of 2096
199	Chapter LXXXXXXXVIII. The Law of 2097
200	Chapter LXXXXXXXIX. The Law of 2098
201	Chapter LXXXXXXXX. The Law of 2099
202	Chapter LXXXXXXXXI. The Law of 2100

Relevant Statutory Provisions

Chapter 138 of the Laws of 1970

AN ACT

To provide for the apportionment of state monies to certain non-public schools in connection with inspection and examination, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July

[1]

first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, on any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year.

year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid between January fifteenth and March fifteenth of such year; and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable

on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect September first, nineteen hundred seventy.

Other Relevant Statutory Provisions

§ 215. Visitation and reports

The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.

§ 313. [Discrimination in admission of applicants to educational institutions.]

(1) Declaration of policy. It is hereby declared to be the policy of the state that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin, except that, with regard to religious or denominational educational institutions, students, otherwise qualified, shall have the equal opportunity to attend therein without discrimination because of race, color or national origin. It is a fundamental American right for members of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith or to effectuate the religious principles in furtherance of which they are maintained. Nothing herein contained shall impair or abridge that right.

(2) Definitions. (a) Educational institution means any educational institution of post-secondary grade subject to the visitation, examination or inspection by the state board of regents or the state commissioner of education and any business or trade school in the state.

(b) Religious or denominational educational institution means an educational institution which is operated, supervised or controlled by a religious or denominational organization and which has certified to the state commissioner of education that it is a religious or denominational educational institution.

(3) Unfair educational practices. It shall be an unfair educational practice for an educational institution after September fifteenth, nineteen hundred forty-eight:

(a) To exclude or limit or otherwise discriminate against any person or persons seeking admission as students to such institution because of race, religion, creed, color, or national origin; except that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its students exclusively or primarily from members of such religion or denomination or from giving preference in such selection to such members or to make such selection of its students as is calculated by such institution to promote the religious principles for which it is established or maintained.

(b) To penalize any individual because he has initiated, testified, participated or assisted in any proceedings under this section.

(c) To accept any endowment or gift of money or property conditioned upon teaching the doctrine of supremacy of any particular race.

(d) It shall not be an unfair educational practice for any educational institution to use criteria other than race, religion, creed, color or national origin in the admission of students.

(4) Certification of religious and denominational institutions. An educational institution operated, supervised or controlled by a religious or denominational organization may, through its chief executive officer, certify in writing to the commissioner that it is so operated, controlled or supervised, and that it elects to be considered a religious or denominational educational institution, and it thereupon shall be deemed such an institution for the purposes of this section.

(5) Procedure. (a) Any person seeking admission as a student who claims to be aggrieved by an alleged unfair educational practice, hereinafter referred to as the petitioner, may himself, or by his parent or guardian, make, sign and file with the commissioner of education a verified petition which shall set forth the particulars thereof and contain such other information as may be required by the commissioner. The commissioner shall thereupon cause an investigation to be made in connection therewith; and after such investigation if he shall determine that probable cause exists for crediting the allegations of the petition, he shall attempt by informal methods of persuasion, conciliation or mediation to induce the elimination of such alleged unfair educational practice.

- (b) Where the commissioner has reason to believe that an applicant or applicants have been discriminated against, except that preferential selection by religious or denominational institutions of students of their own religion or denomination shall not be considered an act of discrimination, he may initiate an investigation on his own motion.
- (c) The commissioner shall not disclose what takes place during such informal efforts at persuasion, conciliation or mediation nor shall he offer in evidence in any proceeding the facts adduced in such informal efforts.
- (d) A petition pursuant to this section must be filed with the commissioner within one year after the alleged unfair educational practice was committed.
- (e) If such informal methods fail to induce the elimination of the alleged unfair educational practice, the commissioner shall have power to refer the matter to the board of regents which shall issue and cause to be served upon such institution, hereinafter called the respondent, a complaint setting forth the alleged unfair educational practice charged and a notice of hearing before the board of regents, at a place therein fixed to be held not less than twenty days after the service of said complaint.
- Any complaint issued pursuant to this section must be issued within two years after the alleged unfair educational practice was committed.
- (f) The respondent shall have the right to answer the original and any amended complaint and to appear at such hearing by counsel, present evidence and examine and cross-examine witnesses.
- (g) The commissioner and the board of regents shall have the power to subpoena witnesses, compel their attendance, administer oaths, take testimony under oath and require the production of evidence relating to the matter in question before it or them. The testimony taken at the hearing, which shall be public shall be under oath and shall be reduced to writing and filed with the board of regents.
- (h) After the hearing is completed the board of regents shall file an intermediate report which shall contain its findings of fact and conclusions upon the issues in the proceeding. A copy of such report shall be served on the parties to the proceeding. Any such party within twenty days thereafter, may file with the regents exceptions to the findings of fact and conclusions, with a brief in support thereof, or may file a brief in support of such findings of fact and conclusions.
- (i) If, upon all the evidence, the regents shall determine that the respondent has engaged in an unfair educational practice, the regents

shall state their findings of fact and conclusions and shall issue and cause to be served upon such respondent a copy of such findings and conclusions and an order requiring the respondent to cease and desist from such unfair educational practice, or such other order as they deem just and proper.

(j) If, upon all the evidence, the regents shall find that a respondent has not engaged in any unfair educational practice, the regents shall state their findings of fact and conclusions and shall issue and cause to be served on the petitioner and respondent, a copy of such findings and conclusions, and an order dismissing the complaint as to such respondent.

(6) Judicial review and enforcement. (a) Whenever the board of regents has issued an order as provided in this section it may apply to the supreme court for the enforcement of such order by a proceeding brought in the supreme court within the third judicial district. The board of regents shall file with the court a transcript of the record of its hearing, and the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to make an order annulling or confirming, wholly or in part, or modifying the determination reviewed. The order of the supreme court shall be subject to review by the appellate division of the supreme court and the court of appeals, upon the appeal of any party to the proceeding, in the same manner and with the same effect as provided on an appeal from a final judgment made by the court without a jury.

(b) Any party to the proceeding, aggrieved by a final order of the board of regents, may obtain a judicial review thereof by a proceeding under article seventy-eight of the civil practice law and rules, which shall be brought in the appellate division of the supreme court for the third judicial department.

(7) Regents empowered to promulgate rules and regulations. The regents from time to time may adopt, promulgate, amend or rescind rules and regulations to effectuate the purposes and provisions of this section.

(8) The commissioner shall include in his annual report to the legislature (1) a resume of the nature and substance of the cases disposed of through public hearings, and (2) recommendations for further action to eliminate discrimination in education if such is needed.

§ 801. Courses of instruction in patriotism and citizenship and in certain historic documents

1. In order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, the regents of The University of the State of New York shall prescribe courses of instruction in patriotism and citizenship, to be maintained and followed in all the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, over the age of eight years, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools over eight years of age shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools of the city or district in which such pupils reside.

2. The regents shall prescribe courses of instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto, to be maintained and followed in all of the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, in the eighth and higher grades, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools in grades or classes corresponding to the instruction in the eighth and higher grades of the public schools shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils in the public schools of the city or district in which such pupils reside.

3. The regents shall determine the subjects to be included in such courses of instruction in patriotism and citizenship and in the history,

meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto, and the period of instruction in each of the grades in such subjects. They shall adopt rules providing for attendance upon such instruction and for such other matters as are required for carrying into effect the objects and purposes of this section. The commissioner of education shall be responsible for the enforcement of such section and shall cause to be inspected and supervise the instruction to be given in such subjects. The commissioner may, in his discretion, cause all or a portion of the public school money to be apportioned to a district or city to be withheld for failure of the school authorities of such district or city to provide instruction in such courses and to compel attendance upon such instruction, as herein prescribed, and for a non-compliance with the rules of the regents adopted as herein provided.

4. The regents shall designate a week during each year and prescribe a uniform course of exercises in the public schools of the state suitable for pupils of various ages to instill into the minds of such pupils the purpose, meaning and importance of the bill of rights articles in the federal and state constitutions. Such exercises shall be in addition to any prescribed courses of study in the schools.

§ 802. Instruction relating to the flag; holidays

1. It shall be the duty of the commissioner of education to prepare for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulation and instructions as may best meet the varied requirements of the different grades in such schools.

2. It shall also be his duty to make special provision for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day and Flag day, and such other legal holidays of like character as may be hereafter designated by law when the legislature makes an appropriation therefor.

3. Nothing herein contained shall be construed to authorize military instruction or drill in the public schools during school hours.

§ 803. Instruction in physical education and kindred subjects

1. All pupils above the age of eight years in all elementary and secondary schools, shall receive as part of the prescribed courses of instruction therein such physical education under the direction of the commissioner of education as the regents may determine. Such courses shall be designed to aid in the well-rounded education of pupils and in the development of character, citizenship, physical fitness, health and the worthy use of leisure. Pupils above such age attending the public schools shall be required to attend upon such prescribed courses of instruction.
2. The board of education or trustees of every school district regularly employing twenty or more teachers shall employ a teacher or teachers qualified and duly licensed under the regulations of the regents to give such instruction; in every other district of the state, they shall require such instruction to be given by the teacher or teachers regularly employed to give instruction in other subjects or by a teacher or teachers qualified and duly licensed under the regulations of the regents.
3. The boards of education or trustees of two or more contiguous districts in the same supervisory district, however, may join in the employment of a teacher qualified and duly licensed under the regulations of the regents to give such instruction; and the salary of such teacher and the expenses incurred on account of such instruction shall be apportioned by the district superintendent among such districts according to the assessed valuation thereof, and as so apportioned shall be a charge upon each of such districts.
4. Similar courses of instruction shall be prescribed and maintained in private schools in the state and all pupils in such schools over eight years of age shall attend upon such courses; and if such courses are not so established and maintained in any private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to children of like ages in the public school or schools of the city or district in which the child resides.
5. It shall be the duty of the regents to adopt rules determining the subjects to be included in courses of physical education provided for in this section, the period of instruction in each of such courses, the qualifications of teachers, and the attendance upon such courses of instruction.
6. The physical education hereinbefore provided for, may be given, when practicable, in any armory of the state where such armory is

within convenient distance from the school, and at such times and in such manner as not to interfere with the regular military uses of such armory. The commanding officer in charge of any such armory shall, upon application made by any board of education or trustees of the several cities and school districts within the state, permit access to any such armory, for the purposes herein mentioned.

§ 804. Instruction regarding nature of alcoholic drinks

1. The nature of alcoholic drinks and their effects on the human system shall be taught in connection with the various divisions of physiology and hygiene as thoroughly as are other branches in all schools under state control, or supported wholly or in part by public money of the state, and also in all schools connected with reformatory institutions.

2. All pupils in the above-mentioned schools below the second year of the high school and above the third year of school work computing from the beginning of the lowest primary, not kindergarten, year, or in corresponding classes of ungraded schools, shall be taught and shall study this subject every year with suitable text-books in the hands of all pupils, for not less than three lessons a week for ten or more weeks, or the equivalent of the same in each year, and must pass satisfactory tests in this as in other studies before promotion to the next succeeding year's work; except that, where there are nine or more years below the high school, the study may be omitted in all years above the eighth year and below the high school, by such pupils as have passed the required tests of the eighth year.

3. In all schools above-mentioned, all pupils in the lowest three primary, not kindergarten, school years or in corresponding classes in ungraded schools shall each year be instructed in this subject orally for not less than two lessons a week for ten weeks, or the equivalent of the same in each year, by teachers using text-books adapted for such oral instruction as a guide and standard, and such pupils must pass such tests in this as may be required in other studies before promotion to the next succeeding year's work. Nothing in this section shall be construed as prohibiting or requiring the teaching of this subject in kindergarten schools.

4. The local school authorities shall provide needed facilities and definite time and place for this branch in the regular courses of study.

5. The textbooks in the pupils' hands shall be graded to the capacities of fourth year, intermediate, grammar and high school pupils, or

to corresponding classes in ungraded schools. For students below high school grade, such textbooks shall give at least one-fifth their space, and for students of high school grade, shall give not less than twenty pages to the nature and effects of alcoholic drinks. This subject must be treated in the textbooks in connection with the various divisions of physiology and hygiene, and pages on this subject in a separate chapter at the end of the books shall not be counted in determining the minimum. No textbook on physiology not conforming to this section shall be used in the public schools.

6. All regents' examinations in physiology and hygiene shall include a due proportion of questions on the nature of alcoholic drinks and their effects on the human system.

7. In all state teachers colleges and state colleges for teachers adequate time and attention shall be given to instruction in the best methods of teaching this branch, and no teacher shall be licensed who has not passed a satisfactory examination in the subject and the best methods of teaching it.

§ 804-a. Instruction regarding the nature and effects of narcotics and habit-forming drugs

1. The courses of study beyond the first eight years of full time public day schools shall provide for instruction in the nature and effects on the human system of narcotics and habit-forming drugs, in accordance with the provisions of this section.

2. It shall be the duty of the commissioner to prescribe such courses of instruction as he may deem necessary and desirable for the welfare of the student and the community. The contents of such courses may be varied to meet the needs of particular school districts, or portions thereof, and need not be uniform throughout the state. The courses shall emphasize desirable health habits, attitudes and knowledge of the effects of narcotics and habit-forming drugs upon the physical, mental and emotional development of children and youth.

3. The local school authorities shall provide needed facilities and definite time and place for such subjects as prescribed by the commissioner.

4. Similar courses of instruction shall be prescribed and maintained in all private secondary schools in this state.

5. In all state teachers colleges and state colleges for teachers adequate time and attention shall be given to instruction in the best methods of teaching such subjects, and no teacher shall be licensed to teach

at the secondary level who has not passed a satisfactory examination in such subjects and the best methods of teaching them. Added L. 1952, c. 413, § 2, eff. July 1, 1952.

§ 805. Enforcement

1. On satisfactory evidence that any teacher has wilfully refused to teach such subjects, as provided in sections eight hundred four and eight hundred four-a, the commissioner of education shall revoke the license of such teacher.

2. No public money of the state shall be apportioned by the commissioner of education or paid for the benefit of any city school district of a city having one hundred twenty-five thousand inhabitants or more according to the latest federal census until the superintendent of schools therein shall have filed with the treasurer or chamberlain of such city an affidavit, and with the commissioner of education a duplicate of such affidavit, that he has made thorough investigation as to the facts, and that to the best of his knowledge, information and belief, all the provisions of sections eight hundred four and eight hundred four-a have been complied with in all the schools under his supervision in such district during the last preceding legal school year.

3. No public money of the state shall be apportioned by the commissioner of education or by district superintendents, or paid for the benefit of any school district, including city school districts of cities having less than one hundred twenty-five thousand inhabitants according to the latest federal census, until the president of the board of education, or in the case of common school districts the trustee or any member of the board of trustees, shall have filed with the district superintendent having jurisdiction or, in the case of such a city school district, or other district having its own superintendent of schools, with the commissioner of education, an affidavit that he has made thorough investigation as to the facts and that to the best of his knowledge, information and belief, all the provisions of sections eight hundred four and eight hundred four-a have been complied with in such district, which affidavit shall be included in the trustees' annual report.

4. It shall be the duty of every district superintendent to file with the commissioner of education an affidavit in connection with his annual report, showing all districts in his jurisdiction that have and those that have not complied with all the provisions of sections eight hundred four and eight hundred four-a, according to the best of his knowledge, information and belief, based upon a thorough investigation by him as to the facts.

5. No public money of the state shall be apportioned or paid for the benefit of any school mentioned herein until the officer having jurisdiction or supervision thereof shall have filed with the commissioner of education an affidavit that he has made thorough investigation as to the facts and that to the best of his knowledge, information and belief, all the provisions of sections eight hundred four and eight hundred four-a relative thereto have been complied with.

6. The principal of each state teachers college and state college for teachers in the state shall at the close of each school year file with the commissioner of education an affidavit that all the provisions of sections eight hundred four and eight hundred four-a applicable thereto have been complied with during the school year just terminated and until such affidavit shall be filed no warrant shall be issued by the commissioner of education for the payment by the treasurer of any part of the money appropriated for such school.

7. It shall be the duty of the commissioner of education to provide blank forms of affidavit required herein for use by the local school officers, and he shall include in his annual report a statement showing every school district which has failed to comply with all the provisions of sections eight hundred four and eight hundred four-a during the preceding school year.

8. On complaint by appeal to the commissioner of education by any patron of the schools mentioned in sections eight hundred four and eight hundred four-a or by any citizen that any provision of such sections has not been complied with in any city or district, the commissioner of education shall make immediate investigation, and on satisfactory evidence of the truth of such complaint, shall thereupon and thereafter withhold all public money of the state to which such city or district would otherwise be entitled, until all the provisions of such sections shall be complied with in said city or district.

§ 806. Courses of instruction in highway safety and traffic regulation; school safety patrols

1. The regents of The University of the State of New York shall prescribe courses of instruction in highway safety and traffic regulation, to be maintained and followed in all the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like grade in the public schools in the city or district in which such pupils reside.

2. The regents shall determine the subjects to be included in such courses of instruction in highway safety and traffic regulation, and the period of instruction in each of the grades in such subjects. They shall adopt rules providing for attendance upon such instruction and for such other matters as are required for carrying into effect the teaching of the courses of instruction prescribed by this section. The commissioner of education shall be responsible for the enforcement of such section and shall cause to be inspected and supervise the instruction to be given in such subjects. The commissioner may, in his discretion, cause all or a portion of the public school money to be apportioned to a district or city to be withheld for failure of the school authorities of such district or city to provide instruction in such courses and to compel attendance upon such instruction, as herein prescribed, and for a noncompliance with the rules of the regents adopted as herein provided.

3. Any board of education or school district board is empowered to organize in the school over which it has control a school safety patrol and, with the written consent of the parents, to appoint pupils as members thereof for the purpose of influencing and encouraging the safe use of highways and highway crossings by the pupils of the school. Nothing herein contained shall be construed to authorize or permit the use of any safety patrol member for the purpose of directing vehicular traffic nor shall any safety patrol member be stationed in that portion of the highway intended for the use of vehicular traffic. Such patrol shall function only under the direction and control of the principal or teacher in charge of such school. No liability shall attach either to the school district or any individual, trustee, board member, superintendent, principal, teacher or other school authority by virtue of the organization, maintenance or operation of a school safety patrol organized, maintained and operated under authority of this section.

§ 807. Fire drills

1. It shall be the duty of the principal or other person in charge of every public or private school or educational institution within the

state, other than colleges or universities, having more than twenty-five pupils, or maintained in a building two or more stories high to instruct and train the pupils by means of drills, so that they may in a sudden emergency be able to leave the school building in the shortest possible time and without confusion or panic. Such drills or rapid dismissals shall be held at least twelve times in each school year, eight of which required drills shall be held between September first and December first of each such year. At least one-third of all such required drills shall be through use of the fire escapes on buildings where fire escapes are provided. At least four additional drills shall be held in each school year during the hours after sunset and before sunrise in school buildings in which students are provided with sleeping accommodations. At least two additional drills shall be held during summer school in buildings where summer school is conducted, and one of such drills shall be held during the first week of summer school.

3. It shall be the duty of the person in charge of every public or private college or university within the state, having more than twenty-five students, or maintained in a building two or more stories high to instruct and train the students by means of drills, so that they may in a sudden emergency be able to leave the college or university building in the shortest possible time and without confusion or panic. Such drills shall be held at least three times in each year, one of which required drills shall be held between September first and December first of each such year. In buildings where summer sessions are conducted, one of such required drills shall be held during the first week of such summer session. At least one of such required drills shall be through use of the fire escapes on buildings where fire escapes are provided. At least one additional drill shall be held in each year during the hours after sunset and before sunrise in college or university buildings in which students are provided with sleeping accommodations.

4. Neglect by any principal or other person in charge of any public or private school or educational institution to comply with the provisions of this section shall be a misdemeanor punishable at the discretion of the court by a fine not exceeding fifty dollars; such fine to be paid to the pension fund of the local fire department where there is such a fund.

§ 807-a. Fire inspections

1. It shall be the duty of the school authorities in general charge of the operation of any public or private school to cause the buildings

of such school containing classroom, dormitory, laboratory, physical education, dining or recreational facilities for student use to be inspected at least annually for fire hazards which might endanger the lives of students, teachers and employees therein.

2. The annual fire inspection shall be made prior to the first day of December of every school year and the report thereof shall be filed by the school authorities in the places required by subdivision five of this section no later than the sixteenth day of December of every such year.

3. a. The school authorities shall cause any fire inspection pursuant to this section to be made by one of the following methods, or any combination of such methods:

(1) Employing, either regularly or specially, persons who, in the judgment of the school authorities, are qualified to make such an inspection, or any phase thereof.

(2) Contracting for the making of such inspections, or any phase thereof, by persons who, in the judgment of the school authorities, are qualified.

(3) Requesting inspection by the fire department of any city, town, village or fire district in which the building is located.

(4) Requesting inspection by a fire corporation which is subject to the provisions of article ten of the membership corporations law, if such building is located within the area described in the certificate of incorporation of any such corporation.

(5) Requesting inspection by the county fire coordinator, or the officer performing the powers and duties of a county fire coordinator pursuant to a local law, of the county in which the building is located, or by any deputy county fire coordinator or deputy of such other officer so performing the powers and duties of a county fire coordinator designated to make the inspection by the county fire coordinator or such other officer so performing the powers and duties of a county fire coordinator, if the building is located outside a city, town, village, or fire district, which has its own fire department and outside the area described in the certificate of incorporation of any fire corporation which is subject to the provisions of article ten of the membership corporations law.

b. If any such inspection, or phase thereof, is to be made by either of the methods specified in subparagraphs (1) and (2) of paragraph a of this subdivision, the school authorities shall give reasonable notice of the date and time such inspection is to be made to the chief engineer or other comparable officer, of any fire department, or fire corporation.

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which has the regular duty of fighting fire in the building to be inspected. Such officer, or any subordinate designated by him, may be present during the inspection and may also file a report of inspection in the manner provided in this section.

c. If any fire department or fire corporation described in subparagraphs (3) and (4) of paragraph a of this subdivision shall fail or refuse to make a fire inspection promptly after having been requested to do so by the school authorities, the school authorities may request the county fire coordinator, or the officer performing the powers and duties of a county fire coordinator pursuant to a local law, of the county in which the building is located to make such inspection. It shall be the duty of the county fire coordinator, or such other officer so performing the powers and duties of a county fire coordinator, in such case to make such inspection or cause it to be made by a deputy whom he shall designate.

d. Regardless of the method or methods used to accomplish the inspection required by this section, the person making the inspection shall file the report thereof with the school authorities no later than the first day of December.

4. The director of the division of fire safety of the office for local government in the executive department shall prescribe the form of the fire inspection report. The commissioner of education shall furnish a supply of such form to school authorities.

5. The report of any fire inspection shall be filed in the office of the school authorities and, in the case of private schools, the report also shall be filed in the office of the director of division of fire safety of the office for local government in the executive department and, in the case of public schools, the report also shall be filed with the commissioner of education. All such reports so filed in any public office shall be kept as public records for at least three years after which period they may be destroyed.

6. It shall be the duty of the commissioner of education, in the case of public schools, and the director of the division of fire safety, in the case of private schools, to ascertain annually whether the inspections of school buildings required by this section have been made and the reports of the inspection have been filed in their respective offices. The commissioner of education, in the case of public schools, and the director of the division of fire safety, in the case of private schools, shall review the reports of inspection filed pursuant to this section and may make recommendations to the school authorities with respect to any

problems relating to school fire safety noted in such reports. The commissioner of education, in the case of public schools, and the director of the division of fire safety, in the case of private schools, may inspect or cause to be inspected at any reasonable time for fire prevention and fire protection purposes the school buildings required to be inspected by this section.

7. Every public or private school required to be inspected as hereinabove provided may be inspected for fire prevention and fire protection purposes at any reasonable time by

- a. the chief of the fire department of the city, town, village or fire district in which the school is located,
- b. the chief of a fire corporation having its headquarters outside a village or fire district, if the school is located in the area described in the certificate of incorporation of such company,
- c. the chief of the fire department or fire company affording fire protection to a fire district, fire protection district, or fire alarm district pursuant to a contract, if the school is located in any such district,
- d. the member of any fire department or fire company listed in paragraphs a, b or c of this subdivision assigned by the chief thereof the duty of inspecting college buildings.

8. Any person, or any public or other corporation for which any such person acts, shall not be liable for any error, omission or lack of thoroughness in the making of the inspection and report required or permitted by this section.

9. The term "school authorities", as used in this section, means, in relation to public schools, the trustees, or board of education, or corresponding officers, whether one or more, and by whatever name known of a city school district, or other school district however created, or, in relation to private schools, the board of trustees, board of directors, or other governing board in general charge of the operation of any such school.

10. The term "private school", as used in this section, means:

- a. Any nursery school or kindergarten attended by six or more pupils three years of age or older which may apply for registration by the New York state education department pursuant to part one hundred twenty-five of title eight of the official compilation of codes, rules and regulations of the state of New York; provided, however, that this section shall not apply to day care facilities possessing a valid permit as required by section three hundred ninety of the social welfare law; or

b. Any establishment, other than a public school, attended by twenty-five or more pupils for the purpose of receiving the instruction of academic grade at the elementary or secondary level required by part one of article sixty-five of this chapter.

11. This section shall not apply to the school authorities in any city having one hundred twenty-five thousand or more inhabitants according to the latest federal census or to colleges and universities.

§ 807-c. Transmission of fire alarm to fire department. (1) The school authorities designated in subdivision nine of section eight hundred seven-a of this chapter in charge of the operation of any public school or of any private school designated in subdivision ten of such section, located in an area within which a fire department or fire company is responsible for fire protection and within which there is no electrically or electronically operated fire alarm reporting system provided for public use shall cause the internal fire alarm, fire detection, or fire protection system of each building in which is contained classroom, dormitory, laboratory, physical education, dining or recreational facilities for student use to be interconnected by direct wire with the fire alarm reporting location or system which is provided for such fire department or fire company to receive alarms from the public so that upon activation of such internal fire alarm, fire detection, or fire protection system a signal will be automatically transmitted to such fire alarm reporting location or system.

(2) In lieu of such interconnection by direct wire, upon agreement between such school authorities and such fire department or company such signal may be transmitted by radio wave.

§ 2. This act (§ 807-c) shall take effect September first, nineteen hundred seventy-one.

§ 808. Instruction in fire prevention

1. The commissioner of education is hereby directed to provide and prescribe a course of instruction in fire prevention relating to the protection of life and property against loss or damage as a result of preventable fire, for use in the schools of the state, as prescribed by this section.

2. The board of education, trustees, principal or other person in charge of every public, private and parochial school in the state shall arrange for giving such course of instruction in every school under its or his control or direction. Such instruction shall be given to all of the pupils in every such school for a period of not less than fifteen minutes in each week during which such school is in session.

§ 809. Instruction in the humane treatment of animals and birds

The officer, board or commission authorized or required to prescribe courses of instruction shall cause instruction to be given in every elementary school under state control or supported wholly or partly by public money of the state, in the humane treatment and protection of animals and birds and the importance of the part they play in the economy of nature. Such instruction shall be for such period of time during each school year as the board of regents may prescribe and may be joined with work in literature, reading, language, nature study or ethnology. Such weekly instruction may be divided into two or more periods. A school district shall not be entitled to participate in the public school money on account of any school or the attendance at any school subject to the provisions of this section, if the instruction required hereby is not given therein.

§ 809-a. Instruction in the safe use of firearms and in the game laws

The officer, board, or commission authorized or required to prescribe courses of instructions in any school under state control, may authorize instructions to be given in the safe and proper use of firearms, and may also authorize instructions to be given in the study of game laws and of proper hunting and conservation practices. Such courses of instruction shall be approved by both the education department and the conservation department.

§ 810. Conservation day

1. The last Friday in April each year is hereby made and declared to be known as Conservation day, and observed in accordance with the provisions of this chapter.

2. It shall be the duty of the authorities of every public school in this state to assemble the pupils in their charge on that day in the school building, or elsewhere, as they may deem proper, and to provide for and conduct (1) such exercises as shall tend to encourage the planting, protection and preservation of trees and shrubs, and an acquaintance with the best methods to be adopted to accomplish such results, and (2) such lectures, pictures or tours, as shall tend to increase the interest and knowledge of such pupils in the fish and wild life, soil and water of the state.

3. The commissioner of education may prescribe from time to time a course of exercises and instruction in the subjects hereinbefore mentioned, which shall be adopted and observed by the public school authorities on Conservation day. Upon receipt of copies of such course sufficient in number to supply all the schools under their supervision, the school authorities aforesaid shall promptly provide each of the schools under their charge with a copy, and cause it to be observed.

§ 811. Procurement, use and possession of hypodermic syringes and needles by school personnel for educational purposes

1. Notwithstanding the provisions of section seventeen hundred forty-seven-d of the penal law, it shall be lawful for authorized persons under the jurisdiction of the public school authorities in a public school; or of the state education department; or of the governing board of any other educational institution, the curriculum of which is registered by the department, to purchase, acquire, have under control, possess and use hypodermic syringes and needles for instructional or other educational purposes provided such school authorities in the case of a school district, the appropriate superior officer in the case of the department, or such governing board in the case of other institutions, has filed with the commissioner of education and with the state department of health a certificate of need for such hypodermic needles which shall set forth the following:

a. The legal designation and address of the school district, if a public school or if another school or institution, the name and address thereof, and the exact location where such hypodermic syringes and needles will be used and stored.

b. The name and address of the chief administrative officer of the school or institution.

c. The use proposed to be made of such hypodermic needles.

d. The names of persons employed in the school, the department, or other institution authorized to have custody and/or use of such hypodermic needles.

e. The safeguards to be taken to prevent such instruments from falling into the hands of unauthorized persons.

f. The disposition which will be made of unwanted or broken syringes and needles. In the case of the department such certificate shall be made and filed by the assistant commissioner under whose supervision the work involving the use of such hypodermic syringes or needles is done, and a duplicate thereof shall be filed with the state department of health.

2. Nothing contained in this section shall be construed to require the filing of such names by medical institutions, including but not limited to public health centers, industrial clinics, diagnostic, treatment or research centers, rehabilitation facilities, nursing homes, medical schools or colleges, tuberculosis, mental, chronic disease and other types of hospitals, clinical laboratories, outpatient departments, nurses training facilities and central service facilities operated in conjunction with medical institutions.

3. The commissioner, after consultation with the commissioner of health, shall make regulations for the administration of this section.

§ 3002. Oath to support federal and state constitutions

It shall be unlawful for any citizen of the United States to serve as teacher, instructor or professor in any school or institution in the public school system of the state or in any school, college, university or other educational institution in this state, whose real property, in whole or in part, is exempt from taxation under section four of the tax law unless and until he or she shall have taken and subscribed the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of..... (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned."

The oath required by this section shall be administered by the president or other head of such school, college, university or institution, or by the officer or person, or in the case of a board or body by a member of the board or body, having authority to employ such person as a teacher, instructor or professor in such school, college, university or institution, and each is hereby authorized to administer it. The officer, person or member administering such oath shall cause a record or notation of the fact to be made in the books or records of the school, college, university or institution. In lieu of the oath administered by an officer, person or member, an employee may comply with the requirements of this section by subscribing and filing the following statement: "I do hereby pledge and declare that I will support the constitution of the United States and the constitution of the State of New York, and that I will faithfully discharge the duties of the position of according to the best of my ability." Such

oath or statement shall be filed with the clerk of a school district or with such officer or employee of any such college, university or other educational institution that shall be designated for such purpose. Such oaths or statements shall be available for public inspection and for transmittal to the commissioner of education upon his request. It shall be unlawful for an officer, person or board having control of the employment, dismissal or suspension of teachers, instructors or professors in such a school, college, university or institution, to permit a person to serve in any such capacity therein in violation of the provisions of this section. This section shall not be construed to require a person to take such oath or to execute such statement more than once during the time he or she is employed in the same school, college, university or institution, though there be a change in the title or duties of the position.

The provisions of section sixty-two of the civil service law shall not apply to a person who is required to take the oath or execute the statement prescribed by this section.

NOTE: Civil Service Law, Section sixty-two, relates to employees of the State and its civil divisions other than school districts.

§ 3204. Instruction required

1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instructions; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English, except that for a period of three years from the date of enrollment in school, pupils who, by reason of foreign birth, ancestry or otherwise, experience difficulty in reading and understanding English, may, in the discretion of the board of education, board of trustees or trustee, be instructed in all subjects in their native language and in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

2-a. Bilingual instruction in schools. 1. The governing board of any school district is hereby empowered to determine the circumstances and necessity wherein instruction shall be given bilingually. The said governing board shall design the necessary procedures and acquire the necessary training materials and equipment to meet the special educational needs of children of limited English speaking ability through programs designed to accomplish the following:

- a. bilingual education;
- b. to impart to students a knowledge of the history and culture associated with their languages;
- c. to establish closer cooperation between the school and the home;
- d. to provide early childhood educational programs related to the purposes of this section and designed to improve the potential for profitable learning activities by children;
- e. to provide adult education programs related to the purposes of this section, particularly for parents of children participating in bilingual programs;
- f. to provide programs designed for dropouts or potential dropouts having need of bilingual programs;
- g. to provide programs to be conducted by accredited trade, vocational or technical schools; and
- h. to provide other activities deemed desirable to further the purposes of this section.

2. Any duly authorized local educational agency or agencies is hereby empowered to make application for any grant or grants in furtherance of this section under Title VII Public Law 90-247 as enacted by the United States Congress January second, nineteen hundred sixty-eight.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States.

b. For part time day schools. The course of study of a part time public day school shall include such subjects as will enlarge the civic and vocational intelligence and skill of the minors required to attend.

c. For evening schools. In a public evening school instruction shall be given in at least speaking, reading, and writing English.

d. For parental schools. In a parental school provision shall be made for vocational training and for instruction in other subjects appropriate to the minor's age and attainments.

e. Changes in courses of study. The state education department shall have power to alter the subjects of instruction as prescribed in this section.

(3) The courses of study beyond the first eight years of full time public day schools may provide a program for a course in "communism and its methods and its destructive effects."

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

5. Subject to rules and regulations of the board of regents, a pupil may, consistent with the requirements of public education and public health, be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporations law.

(The 190 days required by paragraph four no longer holds. Section 3604 on which State aid is based was amended in 1958 to provide for a session of 180 days. Through oversight, Section 3204, paragraph 4 was not amended. The intent is to require 180 days of instruction.)

§ 3210. Amount and character of required attendance

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observances and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this

article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

§ 3211. Records of attendance upon instruction

1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction, or any other school district employee as may be designated by the commissioner of education under section three thousand twenty-four of this chapter, shall keep an accurate record of the attendance and absence of such minor. Such record shall be in such form as may be prescribed by the commissioner of education.

2. Certificates of attendance to be presumptive evidence. A duly certified transcript of the record of attendance and absence of a child which has been kept, as provided in this section, shall be accepted as presumptive evidence of the attendance of such child in any proceeding brought under the provisions of part one of this article.

3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of the records of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the

instruction upon which a minor attends, as provided by part one of this article, shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. He shall give prompt notification in writing to the school authorities of the city or district of the discharge or transfer of any such minor from attendance upon instruction, stating the date of the discharge, its cause, the name of the minor, his date of birth, his place of residence prior to and following discharge, if such place or residence be known, and the name of the person in parental relation to the minor.

Rules of The Board of Regents

3.36 Nonpublic schools. The Commissioner of Education, with the approval of the Regents, shall promulgate regulations relating to the apportionment of funds to nonpublic schools pursuant to the provisions of Chapter 138 of the Laws of 1970.

Regulations of The Commissioner

101.7 Pupil attendance record keeping. (a) *Definitions.* Whenever used in this section, the following terms shall have the respective meanings hereinafter set forth or indicated:

(1) *Pupil.* A child enrolled in any public school in the State of New York.

(2) *Register of attendance.* Any book, card or other form used to keep a record or list or account of attendance, absence and tardiness of a pupil, the form of which shall have been approved by the Commissioner of Education.

(3) *Teacher.* A member of the teaching and supervisory staff of a school district of the State.

(4) *Employee other than a teacher.* A suitable person other than a teacher employed by a school district of the State in a position appropriate for the keeping of records.

(b) The record of each pupil's attendance, absence and tardiness shall be kept by each school district in a register of attendance in a manner approved by the Commissioner of Education.

(c) The register of attendance shall set forth at least the following for each pupil:

- (1) name;
- (2) date of birth;
- (3) full names of parents or guardians;
- (4) address.

(d) All entries in a register of attendance shall be made either by a teacher or by an employee other than a teacher designated by the board of education.

(e) The board of education shall designate a teacher to supervise the keeping of the register of attendance where an employee other than a teacher is designated by the board of education as the person to make entries in the register of attendance.

(f) The entries in the register of attendance shall be verified by the oath or affirmation of the person making the entries in the register of attendance.

PART 176

Apportionments to Nonpublic Schools in Connection with Examination and Inspection

Section 176. *Qualification.* To qualify for apportionments of State monies in connection with examination and inspection pursuant to the provisions of Chapter 138 of the Laws of 1970, a nonpublic school shall meet each of the following requirements:

(a) All teachers serving on the staff of such school shall either possess a valid teacher's certificate issued by the commissioner, or shall be certified by the chief administrative officer of such school as meeting all the requirements of such school for the position in which the teacher serves.

(b) Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.

(c) Such school, if it offers instruction at the secondary level (any of the grades seven through twelve) shall submit annually to the State Education Department, at such time and in such form as the commissioner may require, a *Secondary School Report (Private Schools)*.

(d) Such school shall submit annually to the State Education Department, at such time and in such form as the commissioner may require, a *Report of Non-public Schools (Basic Educational Data System)*.

(e) Such school shall submit to the State Education Department at such times and in such form as the commissioner may require, such additional information as may be specified by the commissioner pursuant to the provisions of Education Law Section 215.

(f) Such school shall maintain, in a form and manner specified by the commissioner, a register of the attendance of each pupil enrolled in the school. All such registers shall be retained by the school for a period of not less than fifty years following the close of the school year for which each such register was maintained, and shall be made available for inspection by authorized representatives of the State Education Department upon request. Summaries of such attendance registers shall be submitted annually to the State Education Department at such time and in such form as the commissioner shall prescribe.

(g) Such school shall be organized and conducted solely for educational purposes, and no part of its assets or income shall be distributable to or enure to the benefit of any shareholder, director, officer or employee, except for reasonable compensation for services rendered. If such school is a corporation, it shall possess a valid and current certificate of exemption from taxation issued pursuant to United States Internal Revenue Code Section 501 (c) (3).

Section 177. Application for apportionment.

(a) Each application by a nonpublic school for an apportionment of State monies in connection with examination and inspection pursuant to Chapter 138 of the Laws of 1970 shall be submitted to the State Education Department at such time and in such form as the commissioner shall prescribe, and shall certify that throughout the "base year," as defined in Chapter 138, the school did in all respects comply with, and during the "current year," as defined in Chapter 138, the school will comply with all the provisions of Education Law sections 313, 801 through 811, 3204 and 3210, paragraph 2, to the extent that such provisions are applicable to a school offering instruction in the grades conducted by the school submitting such application.

(b) A school which elects to be considered a religious or denominational educational institution for the purposes of Education Law section 313 shall submit to the State Education Department, with the application referred to in subdivision (a) of this section, a certification, in the form prescribed by the commissioner, pursuant to the provisions of paragraph (4) of section 313 of the Education Law.

Section 178. Payment of apportionments.

(a) Apportionments to a qualifying school which is incorporated by the Board of Regents or pursuant to a general or special law shall be paid to the corporation.

(b) Apportionments to a qualifying school which is not incorporated shall be paid, on behalf of such school, to a corporate body, designated by such school and approved by the commissioner, whose corporate purposes include the supervision or support of such school, or if there is no such corporate body, to a corporation authorized to do business in this state which is designated by such school, with the approval of the commissioner, for the purpose of receiving such payments for the benefit of such school.

Definitions and Guidelines

INSTRUCTIONS FOR COMPLETING REQUIRED REPORTS INCLUDING APPLICATION AND APPORTIONMENT WORKSHEET

I. DEFINITIONS

1. *Attendance.* Attendance shall be kept in accordance with the Commissioner's Regulation 101.7, paragraph (2).
If you wish to purchase "attendance registers," they may be obtained from the following publishers:
C. F. Williams, 883 Broadway, Albany, N.Y.
Bardeen and Company, 543 E. Genesee St., Syracuse, N.Y.
J. L. Hammett and Company, 89 Broad St., Lyons, N.Y.
Williamson Law Book Company, 2011 E. Main St.
Rochester, N.Y.
Decker Supplies, Brookfield, N.Y.
Gerald Crane Printing Co., 493 S. Legion Drive, Buffalo, N.Y.
Sidney Favorite Printing Co., 22 River St., Sidney, N.Y.
Otto Schmidt and Son, Inc., 117 S. Fourth St., New Hyde Park, N.Y.
Webster Paper and Supply Company, Central Terminal Warehouse, Colony and Montgomery Streets, Albany, N.Y.
2. *Aggregate Attendance* is the total number of days all pupils attended during the year.
3. *Average Daily Attendance (ADA)* is the total number of attendance days of enrolled pupils who are residents of the State of New York during the base year divided by the number of days school was in session during the base year.
4. *Attendance Records.* Instruction VII, section 6 of Register of Attendance refers to register periods "as eight to ten periods." *Ignore this instruction.* For the first year of non-public school apportionment attendance will be determined by a choice of attendance kept for either September, or October, or November, whichever provides the largest apportionment.
5. *Base Year* is the school year immediately preceding the current year; except for school year 1970-71, the base year shall be such school year.

6. *Chief Administrative Officer* is the person who is ultimately responsible for the operation, administration, and supervision of the school including the pupils and its staff, such as the principal of the school or the superintendent or someone with another title but with the same duties.
7. *Commissioner* is the Commissioner of Education.
8. *Corporate Entity* is the school which is incorporated by the Board of Regents or pursuant to a general or special law; or a corporate body designated by such school and approved by the Commissioner, whose corporate purpose includes the supervision or support of such school; or any other corporate body approved by the Commissioner.
9. *Current Year* is the school year during which an apportionment is to be paid pursuant to this chapter.
10. *Days in Session or Actual Session* is the number of days school was actually in session and attendance was kept. *N.B.* See definition Total Session.
11. *Eligible schools.* All nonpublic schools are eligible to apply for the apportionment including those schools covered by sections 4001, 4201 and 4407 of the Education Law.
12. *Legal Holidays.* Schools may not be in session on a Saturday or Sunday, nor on any legal holiday except General Election Day, Lincoln's Birthday, Washington's Birthday. School authorities may decide whether school will be in session on these three legal holidays. When school is in session on these three days, they are counted toward the 180-day requirement. This does not prevent a nonpublic school from being in session on Saturday, or a legal holiday; however, such sessions may not be counted toward the 180-day requirement.

Legal holidays are as follows: Labor Day, Columbus Day, General Election Day, Veteran's Day, Thanksgiving Day, Christmas Day, New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day and Independence Day.
13. *Net Aggregate Attendance* is the aggregate attendance less the aggregate attendance of non-resident pupils.
14. *Non-Profit School* is a school organized and conducted solely for educational purposes, and no part of its assets or income shall be distributable to or enure to the benefit of any share-

holder, director, officer or employee, except for reasonable compensation for services rendered. If such school is a corporation, it shall possess a valid and current certificate of exemption from taxation issued pursuant to United States Internal Revenue Code Section 501 (c) (3).

15. *Nonpublic School* is any school other than public being operated in accordance with the compulsory education law.
16. *Non-resident Pupil* is a pupil who is not a resident of New York State.
17. *Possible Aggregate Attendance* is the total number of days of attendance for all pupils if they were present on every day they were enrolled.
18. *Reports.* The reports listed below together with their due dates are required to qualify for the payment of aid.
 - a) Attendance Report — due July 15 following the completion of the school year.
 - b) Basic Educational Data System, Report of Nonpublic Schools — due November 1.
 - c) Certificate of Religious or Denominational Institution — due November 1.
 - d) Secondary School Report

grade 7 to 12 form	}	due October 15
grade 7 to 9 form		
 - e) Application for Nonpublic School Apportionment — due November 1.
 - f) Nonpublic School Apportionment Worksheet — due January 4
19. *Report Forms — How to Obtain.* Report forms will be mailed to all nonpublic schools known to the State Education Department. (Those schools which have been completing the Basic Educational Data System Report.) Others should write to the New York State Education Department (Nonpublic School Aid), Albany, New York 12224.
20. *Religious or Denominational Education Institutions.* Any school where preference is granted a certain religious group in regard to admission must file a *Certificate of Religious or Denominational Institution* in accordance with Section 312 of the Education Law. All children shall have the equal opportunity to attend therein without discrimination because of race, color or national origin.

21. *Qualifying School* is a non-profit school in the State, other than a public school, which provides instruction in accordance with Section 3204 of the Education Law.
22. *Total Session* is the number of days school was actually in session in the base year and must equal 180 days, except that the Commissioner may disregard such reduction up to five days if he finds that the school was not in session for 180 days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the Commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the Regents examinations or the Regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school or superintendent of the school system. *N.B.* See definition of Days in Session.
23. *Ungraded students.* When students are in ungraded classes or when students are not classified by grade, the students who are age thirteen and over shall eligible for a secondary school apportionment.

II. CRITERIA FOR APPORTIONMENT

Each nonpublic school must certify that it is:

1. A non-profit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law;
2. Providing instruction for all students without regard to race, color, religion, creed or national origin, except that with regard to religious or denominational educational institutions, students otherwise qualified shall have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with Section 313 of the Education Law. Each nonpublic school with a religious affiliation may certify to the Commissioner its intention to be considered a religious or denominational educational insti-

tution within the meaning of this section. This certification is described elsewhere in these Guidelines;

3. Keeping an accurate record of the attendance of minor children attending such school. Such record shall be in such form as prescribed by the Commissioner and described elsewhere in these Guidelines;
4. Providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve, in English, civics and American history in accordance with Section 3204 of the Education Law;
5. Providing instruction in the special areas covered in Sections 801 through 811 of the Education Law as follows:
 - a) Physiology and hygiene, including the nature and the effects on the human system of:
 - (1) alcoholic drinks
 - (2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years)
 - b) The humane treatment of animals and birds (in the elementary grades)
 - c) Physical training for all pupils over eight years of age
 - d) Patriotism and citizenship for all pupils over eight years of age
 - e) The provisions of the Constitution of the United States in the eighth and higher grades
 - f) Highway safety and traffic regulation
 - g) Fire prevention and fire drills
 - h) Correct use and display of the flag
 - i) Observe Arbor and Wild Life Day
6. Administering the Pupil Evaluation Program tests in the third and sixth grades to all students and in the ninth grade to those students who take no Regents examinations or are not in a Regents examination program in accordance with instructions from the Bureau of Pupil Testing and Advisory Services;
7. Staffed by teachers who are certified by the Commissioner or who meet all the requirements of the schools in which they teach for the position in which the teacher serves, as certified by the Chief Administrative Officer or the school;

8. Conforming to Sections 3002 of the Education Law by having all teachers in the school take the oath of affirmation of allegiance;
9. Conducting three civil defense shelter drills during each school year.

III. DIRECTIONS FOR COMPLETING APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT

Each nonpublic school meeting the necessary criteria and desiring to make application for aid should file a completed *Application for Nonpublic School Apportionment, Form SA-170*, with the Division of Educational Finance by November 1, 1970. The items in the application should be completed as follows:

1. *Name of Nonpublic School* — list the popular name of the school.
2. *Identification Number* — leave blank — this number is provided by the Bureau of Statistical Services of the State Education Department.
3. *Location* — include street address, city, town or village, and county of the school.
4. *Mailing Address* — list only if different from the location of the school.
5. *Name of Corporate Entity* — enter the name as defined in definitions in these Guidelines.
6. *Address* — enter mailing address of corporate entity.
7. *Date School Registered* — if the school was registered, show the date the school was last registered with the Board of Regents.
8. *Registering Name* — indicate the exact name of the school under which it is registered.
9. *Date Entity Incorporated* — if the school is incorporated by the Board of Regents or pursuant to a general or special law or if the school has designated a corporate body to receive its apportionment, enter the date of such incorporation.
10. *Incorporation Name* — indicate the exact name of the corporate entity as incorporated.
11. *Religious Affiliation* — if a denominational school, state religious affiliation. The affidavit on the Application for Nonpublic School Apportionment is to be completed by the Chief School Administrator of the school before a Notary Public.

IV. DIRECTIONS FOR COMPLETING NONPUBLIC SCHOOL APPORTIONMENT WORKSHEET

Each nonpublic school will file the *Nonpublic School Apportionment Worksheet, Form SA-171*, by January 4, 1971 in accordance with the directions which follow:

1. Complete the identification of the school and corporate entity following directions in this regard for completing the application.
2. In Entry No. 1 for each monthly attendance period, the Aggregate Attendance of non-resident students is deducted from the Aggregate Attendance to obtain the Net Aggregate Attendance. The Net Aggregate Attendance is divided by the Actual Session to obtain the Average Daily Attendance (ADA).
3. In Entry No. 2 the nonpublic school should select the month that produces the largest apportionment. The month selected must be the same for both grades one to six, and grades seven to twelve.
4. In Entry No. 3 the ADA for grades one to six and grades seven to twelve is inserted in Entries 3a and 3b, respectively. The ADA for grades one to six is multiplied by \$.15 times 180 days. The ADA for grades seven to twelve is multiplied by \$.25 times 180 days. The estimated aid is equal to the sum of Entries 3a and 3b. The aid is an estimated amount because of the 180 day session requirement. Nonpublic schools may estimate aid on a session of 180 days. Schools operating less than 180 days will have their apportionment adjusted accordingly in the following year's payment.
5. The name of the person completing the *Nonpublic School Apportionment Worksheet, Form SA-171*, is necessary when the event a question arises regarding the worksheet.
6. The *Statement of Compliance* is to be completed by the Chief Administrative Officer of the nonpublic school. The official title of the Chief Administrative Officer is necessary in order to determine his official capacity.

V. PAYMENT OF APPORTIONMENT

The apportionment will be paid to the corporate entity identified as the appropriate payee on the *Application for Nonpublic School Apportionment* as approved by the Commissioner.

In accordance with the law, one-half of the estimated total apportionment for the school year shall be paid between January 15 and March 15; the balance to be paid between April 15 and June 15.

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U.S.A.

1. The first part of the book is devoted to a general introduction to the subject of the book. It contains a chapter on the history of the subject, a chapter on the methods of research, and a chapter on the scope of the book.

2. The second part of the book is devoted to a detailed study of the subject. It contains a chapter on the theory of the subject, a chapter on the practice of the subject, and a chapter on the application of the subject.

3. The third part of the book is devoted to a study of the subject in relation to other subjects. It contains a chapter on the subject in relation to the history of science, a chapter on the subject in relation to the philosophy of science, and a chapter on the subject in relation to the social sciences.

4. The fourth part of the book is devoted to a study of the subject in relation to the future. It contains a chapter on the subject in relation to the future of science, a chapter on the subject in relation to the future of the philosophy of science, and a chapter on the subject in relation to the future of the social sciences.

APPORTIONMENT TO NONPUBLIC SCHOOLS

1970 — 71

New York State Education Department

Albany, New York 12224

Offices to Contact For Information

APPORTIONMENT

Division of Educational Finance

518: 474-2977

ATTENDANCE REPORT KEEPING

Bureau of School Social Services

518: 474-8790

ELEMENTARY INSTRUCTIONAL PROGRAMS

Bureau of Elementary School Supervision

518: 474-5894

SECONDARY INSTRUCTIONAL PROGRAMS

Bureau of Secondary School Supervision

518: 474-5923

or

474-5924

TESTING

Bureau of Pupil Testing

518: 474-5099

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X

EXHIBIT F



Background Information on the Nonpublic School Bill

Schools Qualifying

All nonpublic schools offering instruction in grades one through six, or seven through twelve, provided they are incorporated or have an incorporation connected with them, can be expected to qualify for funds. The following classification contains some overlapping but illustrates the varieties and kinds of institutions which might qualify.

- 1) Registered secondary schools
Non-registered secondary schools
- 2) Elementary schools chartered by the Regents
Elementary schools chartered by the Secretary of State
Other non-chartered schools
- 3) Orphan schools and schools for the handicapped

Nonpublic School Count

Elementary Schools	-	1,565
Registered Secondary Schools	-	335
Non-registered Secondary Schools	-	<u>138</u>
Total		2,038

What They Do

- 1) PEP testing
- 2) Regents examinations for those schools offering a Regents diploma, plus equivalent examinations for such areas in which Regents exams are not offered.
- 3) Periodic examinations for the evaluation of the progress of students.
- 4) Transfer records certifying grade record
- 5) Health records for transfers
- 6) Basic Educational Data System

Every nonpublic school known to the Education Department is required each fall to file a statis-

tical report entitled "Basic Educational Data System --Report of Nonpublic Schools" (copy attached). This report includes various kinds of information including:

- a) Counts of full and part-time professional staff in four categories (principal, supervisors and department heads, classroom teachers, other instructional staff);
- b) Pupil enrollment by grade and within ethnic categories;
- c) Times of daily operation by grade;
- d) Number and distribution of graduates in the previous June (secondary schools);
- e) Number of dropouts;
- f) Age of main building and major additions;
- g) Number and types of instructional rooms;
- h) Curricula offered;
- i) Incidence of special instructional procedures such as programmed instruction, simulation or gaining, multimedia instruction, etc.;
- j) Participation in specially funded projects such as those under ESEA Title I.

7) Data from Registered Nonpublic Secondary Schools

Every registered nonpublic secondary school is required to file each fall with the Bureau of Secondary School Supervision a form entitled "Secondary School Report" (copy attached) which includes the following additional kinds of data:

- a) Number of days in session and school calendar information
- b) Number of graduates qualified for Regents diplomas (previous June) and distribution of graduates by major three-year sequence;
- c) Class size and average daily pupil load data;
- d) Names, titles and salaries of administrative and supervisory personnel;

These reports included "Basic Information on the
Report of Research Schools" (see attached). This
report included various kinds of information including

1) Names of full and part-time educational staff
in each category (physical, medical, dental and
educational staff, classroom teachers, other staff
personnel)

2) Full employment of staff and other personnel
employed

3) Types of staff employed by schools

4) Number and distribution of students in the
school (by gender, ethnicity)

5) Number of students

6) List of main building and major facilities

7) Number and types of instructional rooms

8) Number of students

9) Information on special instructional programs and
on personnel involved in instruction or related
educational activities

10) Information on specially trained personnel and
other staff (see attached)

11) Data on instructional materials, facilities, and
other resources

12) Data on instructional materials, facilities, and
other resources

13) Data on instructional materials, facilities, and
other resources

14) Data on instructional materials, facilities, and
other resources

15) Data on instructional materials, facilities, and
other resources

16) Data on instructional materials, facilities, and
other resources

17) Data on instructional materials, facilities, and
other resources

18) Data on instructional materials, facilities, and
other resources

19) Data on instructional materials, facilities, and
other resources

- e) Counts of ancillary staff such as librarians, guidance counselors, psychologists, nurses, etc.;
- f) Counts of professional staff qualified and not qualified for State certification;
- g) Counts of nonprofessional staff;
- h) Tuition charges;
- i) Subject and unit requirements for graduation;
- j) Standardized tests employed;
- k) Types of audio-visual equipment.

8. Health service records

9. Examinations for students not qualifying for a Regents diploma and filed for one year for inspection

10. Attendance records

11. A future development should be more comprehensive expenditure information and inspectorial information on nonpublic schools. The present funding for the performance of such services is not adequate to cover this area.

12. A future requirement will be to collect personnel characteristics for this system.

April 16, 1970

- 1) Council of professional staff and an advisory committee on professional matters, etc.
- 2) Council of professional staff elected and one qualified for State certification.
- 3) Council of nonprofessional staff.
- 4) Faculty changes.
- 5) The set and type requirements for graduation.
- 6) Recommended course schedule.
- 7) Types of audio-visual equipment.

Health Service Records

1. Examination for students not qualifying for a degree and listed for one year for immediate admission.
2. Attendance records.
3. A future development should be some management and financial planning and institutional information on economic matters. The present finding for the year of 1960 at such situation is not adequate to cover the future.
4. A future development will be to collect personnel data and statistics for the year.

April 20, 1970

BASIC EDUCATIONAL DATA SYSTEM REPORT OF NONPUBLIC SCHOOLS FALL 1969

Read Directions Carefully Before Completing This Form

Please Correct Above Information, If Necessary

**The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Information Center on Education
Albany, New York 12224**

BASIC EDUCATIONAL DATA SYSTEM
REPORT OF NONPUBLIC SCHOOLS
FALL 1989

Read Directions Carefully Before Completing This Form

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PROFESSIONAL STAFF IN THIS SCHOOL				
TITLE	FULL-TIME		PART-TIME	
	Elementary	Secondary	Elementary	Secondary
The Principal				
Supervisors and Department Heads				
Classroom Teachers				
Other Instructional Staff				

Grade	Total	American Indian	Negro	Oriental	Spanish Surnamed American	Other
Prekindergarten						
Kindergarten (½ day)						
Kindergarten (full day)						
First						
Second						
Third						
Fourth						
Fifth						
Sixth						
Ungraded Pupils — Handicapped — Elementary						
Seventh						
Eighth						
Ninth						
Tenth						
Eleventh						
Twelfth						
Ungraded Pupils — Handicapped — Secondary						
Post Graduate						

[illegible]

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8.

IF THIS SCHOOL HAD A TWELFTH GRADE LAST YEAR INDICATE
BELOW THE DISTRIBUTION OF THE JUNE 1969 GRADUATES

Total Graduates	Number to Post Secondary In New York State			Number to Post Secondary Outside New York State			Number to Employment	Number to Military Service	Other
	4-Year College	2-Year College	Other Post Secondary	4-Year College	2-Year College	Other Post Secondary			

9. Total 9th Grade Enrollment in October 1965, if any:.....

10. Number of dropouts between July 1, 1968 and June 30, 1969:.....

11. Enter the school year (e.g., 1966-67) in which students were first enrolled in this school building:

12. Enter the school year in which additions to this school, if any, were opened.

Include only the two most recent additions. Do not include additions opened before the 1954-55 school year.

For the purpose of this question, additions do not include 1) temporary structures, such as mobile classrooms,
or 2) structures which do not increase the student capacity of the school, such as a cafeteria:

a.

b.

13.

FACILITIES - (INDICATE NUMBER OF ROOMS IN EACH CATEGORY)

Regular Classrooms		Agriculture Rooms		Cafeteria-Auditorium	
Kindergarten Rooms		Mechanical Drawing Rooms		Gymnasium-Auditorium	
Science Classrooms		Shop (Industrial Art) Rooms		Gymnasium - Cafeteria	
Science Laboratory Rms.		Shop(Vocational)Rooms		Gymnasium - Cafetorium	
Combination Science Classroom-Laboratories		Music Rooms		Gymnasiums	
Language Laboratory Rooms		Special Classrooms for Exceptional Children		Swimming Pools	
Home Economics Rms.		Other Special Classrooms		Total Teaching Stations for Physical Education	
Secretarial Practice Rms.		School Library Areas		Audio-Visual Rooms	
Office Practice Rooms		Study Halls		Multi-Purpose Rooms	
Typing Rooms		Auditoriums		Miscellaneous Instructional Areas	
Art Rooms		Cafeteria or Lunchroom			

EXHIBIT G

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John John

Date: February 22, 1972

RECEIVED

From: Thomas D. Sheldon

Subject: Mandated Services

FEB 22 1972

OFFICE OF THE
COUNSEL

As per our conversation this morning, I am attaching
some material which was submitted to the Regents on
different occasions.

Thomas D. Sheldon

TDS:hw
Att.

Exhibit C

COPY BOUND CLOSE IN CENTER

Chairman Rubin has requested an analysis of the relationship of the costs of nonpublic schools mandated services to the amounts actually received by these schools under the provisions of Chapter 138 of the Laws of 1970. Earlier this year the State Education Department commissioned three studies to provide us with some basis for such estimates. The comments below are necessarily limited to some implications of the reports furnished us under those auspices.

Before beginning, it is important to point out that Chapter 138 does not define "mandated services" but that it provides for "expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the State of various other reports as provided for or required by law or regulation."

While we commonly refer to the Chapter in terms of mandated services, the above implies that the schools are being reimbursed for examinations and testing regardless of whether or not such examinations and tests are precisely stated requirements of the Regents and the State Education Department. Under such an interpretation, as might be expected, the cost data from different schools vary widely, particularly in terms of the different allocations provided to classroom testing. The comments and examples provided below, therefore, should not be construed as indicating that schools are receiving funds contrary to the law. As a matter of fact, reimbursement is provided on the basis of a formula which is in itself independent of such costs; a formula apparently based on an estimate of what such costs might have been at the time of enactment of the law.

The studies referred to above were conducted in the late Winter and Spring of 1971. Three "Modes" were employed. They included estimates of all costs associated with the services listed in Chapter 138 of the Laws of 1970. A limited number of these studies are available in our office for reference and copies can be reproduced if desired. Modes I and III of these studies differentiate these costs associated with classroom testing from costs of State Education Department stipulated tests. Under such circumstances it is possible to make a recomputation as to the estimated amount spent in each instance for services which are specifically included in law or regulation.

Mode II of the study was based on a simple estimation of the amount of time spent by various professional and nonprofessional staff members in general areas, such as examinations and testing, and it is impossible to separate out the costs of classroom testing for non-specifically mandated phases. It is, however, interesting to note a considerable disparity in per pupil costs, indicative of the difficulty in making these estimates. Per pupil costs for services listed in Chapter 138 were estimated from \$231.93 to \$595.94 in four high schools and from \$77.56 to \$474.12 in four elementary schools.

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Following are two examples, one each from Mode I and from Mode III of the study which illustrate the effect of inclusion or non-inclusion of costs associated with ordinary classroom testing:

Example I

Mode I - From study of costs estimated for Catholic Central High School in Lansingburgh, Rensselaer County.
Costs were reported as follows:

I. 1. Teacher Examinations	\$64,752
2. Entrance Examinations	510
3. New York State Regents Scholarship Examinations	190
4. January and June Regents Examinations	2,050
5. SRA Tests	316
6. Otis I.Q. Test	215
7. Kuder Preference Tests	400
8. Diocesan Examinations	420
Total	\$68,853
II. Attendance Costs	
III. Pupil Health Records	\$14,416
IV. Basic Educational Data System	329
V. Secondary School Report	30
	405
Grand Total	\$84,033

Of the above testing and examination services, only the Regents Scholarship and January and June Regents Examinations might be regarded as specifically mandated. Inclusion of such costs only would reduce the examination figure by \$66,629.

The Mode I study for Catholic Central High School also included estimates of costs of services or benefits "in kind" and for indirect costs, such as operation of plant. These costs were based on the foregoing listed services in the ratio such services bore to total school services. Using this same rationale, and taking into account the above exclusion of non-specifically mandated examination costs, the "in kind and benefit" figure would be reduced from \$7310 to \$1462 and the "direct costs" from \$28,962 to \$5792.

SUMMARY

	Original Study Law, Ch. 138	Estimate Less Cost "School Testing"
Direct Costs	\$84,033	\$17,420
Ind and Benefit	7,310	1,462
Indirect Costs.	28,962	5,792
Total	\$120,305	24,674

The apportionment to Catholic Central High School, consistent with Chapter 138, is estimated at \$77,878.

Example 2

Mode III - North Shore Hebrew Academy, Great Neck (Enrollment 200 pupils)

Dr. Miller's study involved asking staff members to estimate the amount of time spent for the various listed services. He then calculated the costs of this time commitment. It is possible in this Mode to extract the time and costs which were associated with classroom testing. This particular school report included 234 "teacher days" at a cost of \$7716 for "teacher time on school tests."

SUMMARY

	Original Study Law, Ch. 138	Estimate Less Cost "School Testing"
Total Administrative Costs	\$ 605	\$ 605
Total Teacher Time for Specifically Mandated Services	1,171	1,171
Total Teacher Time on School Tests	6,716	--
Total	\$8,492	\$1,776
Cost Per Pupil	\$ 42.46	\$ 8.88

The school will be eligible under Chapter 138 for payment of approximately \$27 per pupil (\$5400).

The entire study, from which the above examples were chosen concluded that, including costs of classroom and school testing as appears consistent with Chapter 138 of the Laws of 1970 as written, the nonpublic school incurred costs for all listed services are estimated to be equal to or to exceed the reimbursement provided in the Chapter.

A computation which excludes school or classroom testing not specifically stipulated in law or regulations, will give a somewhat different picture. If the examples cited above are generally typical of nonpublic school costs in New York State, the exclusion of these non-stipulated testing costs reduces total "mandated costs" by about 80%, and indicates an expenditure to reimbursement ratio under such circumstances of approximately 1:3.

Commissioner Nyquist has directed further and more precise studies in the entire area of nonpublic school costs and State-Federal support for same so that the Regents and staff will have a firm basis for their further deliberations in these areas.

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C. Regionalism

One of the major topics discussed at the various regional meetings noted in Item I. D. has concerned several forms of regional organization. Pertinent subtopics have included ROCES services, as well as ROCES groupings to provide educational and management services in particular regions of the State. Additionally, questions have been raised as to the desirability of a decentralization of services of the State Education Department, such as has been discussed by Senator Laverne in several of his public presentations. These same subjects have aroused considerable interest among city, district and village superintendents and regional planning groups at their various meetings.

A revised and rewritten Task Force Report on the subject of Regionalism will also be forwarded to the Regents in the late mailing. It is hoped that the ESC Regents Committee will be able to devote a considerable portion of its session to this important matter.

D. Chapter 133 of the Laws of 1970

Earlier this year we furnished the ESC Regents Committee a brief summary and some comments with respect to costs associated with implementing the provisions of this particular Chapter. In essence it was pointed out that the Law itself does not confine reimbursement to schools to expenditures incurred as a result of State "Mandated Services." Unquestionably the use of this term has led to the assumption that there is such a direct relationship.

The previous paper prepared by the ESC Deputy Commissioner pointed out that if costs associated with normal daily or regular classroom testing were removed from consideration, it would be virtually impossible to reconcile reimbursement in the amounts the particular schools were entitled by law to receive with the costs of services directly mandated by the State. At that time we were requested to make a further study of this matter and at one point considered sending a questionnaire to all the schools involved.

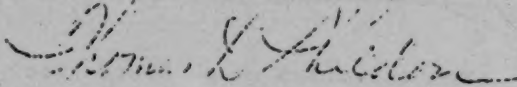
In preparing for such a study we perused materials which had been prepared earlier and are of the opinion that any further questionnaires or inquiries would simply substantiate what we already know. With that in mind another approach has been taken, i.e., we are reporting to you the estimated costs per pupil which are associated with particular mandated services as conducted in the public schools and are making the assumption that this same approximate expenditure rate would be applicable in the nonpublic sector:

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The following report prepared by Mr. Taber utilizes such a basic rationale (Attachment B). Although the original study assumed a lower cost to be associated with nonpublic school testing due to generally lower salaries, we have updated cost data to reflect an assumed equivalent salary structure in order to be entirely fair.

Costs associated with certain other mandated services such as those pertinent to attendance, health records, BEDS, and the secondary school report, have been taken from actual figures submitted by two schools participating in the sample study conducted this past Spring.

Respectfully submitted,



Thomas D. Sheldon

10/12/71

Attachments A - B

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TO: Dr. Shelton

October 13, 1971

FROM: Victor Taber

SUBJECT: Nonpublic School Costs for State Mandated Tests

Attached are the details of my estimates of local school building personnel costs for administering the Pupil Evaluation Program, the Regents Scholarship and College Qualification Testing Program, and the Regents Examination Program. You can see the items or activities included in the cost estimates and the assumptions involved, and can alter them where they are out-of-line or not warranted. In most instances the estimates are generous and may reflect what should be rather than what is.

A summary of the personnel costs based on my estimates and assumptions is as follows:

Program	Personnel Costs	
	Nonpublic Schools	Public Schools
PEP	\$500,000	\$2,260,000
RSCQT	150,000	750,000
Regents	<u>800,000</u>	<u>4,175,000</u>
Total	<u>\$1,450,000</u>	\$7,185,000

To the above examination and testing expenses we add the costs of mandated services for attendance, pupil health records, ZEDS and Secondary School Report. This addition results in a total of \$8,176,720 or \$7,102,640 depending on whether Catholic Central or St. Thomas cost data are used. This sum is probably a reasonably generous estimate of reimbursement for such mandates as are required of nonpublic schools.

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Local Costs for Administering Pupil Evaluation Program (PEP)

1. Type of Costs

A. Central Office Staff (Principal)

- (1) Logistical - Obtaining, distributing, collecting, inventorying and storing materials
- (2) Reporting - preparing summary forms
- (3) Interpreting - analyzing results

B. Teaching Staff

- (1) Administering —
- (2) Scoring & Recording
- (3) Interpreting

2. Time Basis of Costs

A. Central Staff - 8 minutes per pupil tested

(Assumes average of 6 to 8 classes of 25 to 30 pupils with average of 200 pupils per school)

(1) Logistical	10 hrs.
(2) Reporting	5 hrs.
(3) Interpreting	<u>10 hrs.</u>
Total	25 hrs. or 1500 minutes per school

Therefore average time is about 8 minutes per pupil

B. Teaching Staff - 20 minutes per pupil tested

(1) Administration	2 hrs.
(2) Scoring & Recording	3 hrs.
(3) Interpreting	<u>3 hrs.</u>

Total 8 hrs. or 480 minutes per teacher

Therefore if 25 pupils per class, teaching staff time would average 20 minutes per pupil.

3. Summary of Time Bases

A. Central Staff (Principal)	8 minutes per pupil tested
B. Teaching Staff	<u>20 minutes per pupil tested</u>
Total	28 minutes per pupil tested

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4. Projected Cost Estimate

<u>Grade</u>	<u>Pupils Tested and Exempted</u>	
	<u>Nonpublic</u>	<u>Public</u>
3	65,000	258,000
6	66,000	245,000
9	<u>32,000</u>	<u>232,000</u>
Total	163,000	735,000

Assuming a median annual salary of \$10,000, the per pupil cost for PEP would be \$3.08. (This is computed on the basis of 200 days per year at 7½ hours per day = 1500 hours per year at \$6.66 per hour or \$.11 per minute times 28 minutes per pupil tested.) Therefore, the total nonpublic school personnel costs would be about \$500,000 (163,000 pupils times \$3.08) and the public school costs would be about \$2,260,000 (735,000 pupils times \$3.08).

VAT
October 13, 1971

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Form 102 Administering Regents Scholarship
and College Qualification Test (RSCQT)

1. Type of Costs

- A. Supervision & Administration (School Building Central Staff)
- B. Proctoring

2. Time Basis of Costs

A. Supervision & Administration - 15 minutes per candidate

October 1969 - 1200 schools and 180,000 candidates
(average 150 candidates per school)

(1) Orienting Students	3 hrs.
(2) Checking Student Applications	15 hrs.
(3) Ordering & Checking Materials	2 hrs.
(4) Distributing & Collecting Materials	4 hrs.
(5) Reporting and Returning Materials	4 hrs.
(6) Planning and Supervising	10 hrs.
Total	38 hrs.

15 minutes per candidate (or examination)
(2280 minutes divided by 150 candidates)

B. Proctoring - 30 minutes per candidate
(2 proctors for 30 candidates for 7½ hrs)

3. Summary of Time Basis

A. Supervision & Administration	15 minutes per candidate
B. Proctoring	30 minutes per candidate
Total Time	45 minutes per candidate

4. Projected Cost Estimates

- A. Assuming a school median annual salary of \$10,000, the per candidate cost for the RSCQT would be about \$5.00. (This is computed on the basis of 200 days per year at 7½ hours per day = 1500 hours per year at \$6.66 per hour, or \$.11 per minute times 45 minutes per candidate.)
- B. Assume 300 nonpublic schools give RSCQT to an average of 100 pupils for a total of 30,000 candidates
- C. Assume 900 public schools give RSCQT to an average of 166 pupils for a total of 150,000 candidates
- D. The total nonpublic school personnel costs therefore would be about \$150,000 (30,000 candidates times \$5.00) and the total public school costs would be about \$750,000 (150,000 candidates times \$5.00).

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Local Costs for Using Regents Examinations

1. Cost Categories

- A. Supervision and Administrative (School Building Central Staff)
- B. Proctoring (administering examinations to pupils)
- C. Marking and Reporting (Scoring papers and reporting marks to office and pupils)

2. Time Basis for Costs

0:

A. Supervision and Administrative - 4 minutes per examination

- (1) The average school statewide administers 880 examinations per year (January & June 1970 - 1466 schools and 1,291,121 examinations written).
- (2) The average public school administers about 930 and the average nonpublic school administers about 700 per year.
- (3) The average supervisory and administrative time for a school to administer 700-900 examinations per year would be about 4 minutes per examination estimated as follows:

(a) Obtaining Materials	10 hours
(b) Distributing materials to teachers	12 hours
(c) Receiving, reporting, shipping, storing	16 hours
(d) Organizing, scheduling, supervising	<u>12 hours</u>

Total Annual Central Office Time 50 hours

Average Annual Time per examination 4 minutes
(3000 minutes divided by 800 examinations and rounded)

B. Proctoring - 16 minutes per examination

30 examinations in one room with two teachers at 4 hrs. per teacher = 8 hrs. 480 minutes (very generous)
divided by 30 examinations = 16 minutes per examination

C. Marking & Reporting - 15 minutes per examination

15 minutes per examination paper to score, double check, and record marks (generous as many examinations are mostly or totally objective)

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Summary of Time Bases

1. Supervision & Administration	4 minutes per exam
2. Proctoring	16 " " "
3. Marking & Reporting	15 " " "
Total	35 minutes per exam

Projected Cost Estimates

Assuming a median annual salary of \$10,000 per year the personnel costs per examination would be \$3.85. (This is computed on the basis of 200 days at 7½ hours per day = 1500 hours per year at \$6.66 per hour or \$.11 per minute times 35 minutes per examination.)

Nonpublic schools administered roughly 16% of the 1,291,121 examinations written in January and June 1970, or 206,600 examinations, and public schools administered 84%, or 1,084,500.

At \$3.85 per examination, total nonpublic school personnel costs would be about \$800,000 and public school costs about \$4,175,000.

October 13, 1971

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Education of Handicapped Children		Yes	No
Elementary School	Elementary School	<input type="checkbox"/>	<input type="checkbox"/>
	College Preparatory	<input type="checkbox"/>	<input type="checkbox"/>
	Business Vocational	<input type="checkbox"/>	<input type="checkbox"/>
	Vocational (other than Business)	<input type="checkbox"/>	<input type="checkbox"/>
	General	<input type="checkbox"/>	<input type="checkbox"/>
	Other	<input type="checkbox"/>	<input type="checkbox"/>
	Graded or Continuous Progress	<input type="checkbox"/>	<input type="checkbox"/>
Programmed Instruction	Elementary Level	<input type="checkbox"/>	<input type="checkbox"/>
	Junior High Level	<input type="checkbox"/>	<input type="checkbox"/>
	Senior High Level	<input type="checkbox"/>	<input type="checkbox"/>
	Programmed Instruction	<input type="checkbox"/>	<input type="checkbox"/>
	Computer Assisted Instruction	<input type="checkbox"/>	<input type="checkbox"/>
	Individually Prescribed Instruction	<input type="checkbox"/>	<input type="checkbox"/>
	Other Types of Independent Learning	<input type="checkbox"/>	<input type="checkbox"/>
	Simulation or Gaming	<input type="checkbox"/>	<input type="checkbox"/>
	Open Circuit Television	<input type="checkbox"/>	<input type="checkbox"/>
	Closed Circuit Television	<input type="checkbox"/>	<input type="checkbox"/>
Video Tape	Video Tape	<input type="checkbox"/>	<input type="checkbox"/>
	Multimedia Instruction	<input type="checkbox"/>	<input type="checkbox"/>
	Learning Modules Utilizing Various Media	<input type="checkbox"/>	<input type="checkbox"/>
	Centralized School Library	<input type="checkbox"/>	<input type="checkbox"/>
	Performing Arts Program	<input type="checkbox"/>	<input type="checkbox"/>
Program for Implementing Integration	Program for Implementing Integration	<input type="checkbox"/>	<input type="checkbox"/>
	Intercultural Relations Program	<input type="checkbox"/>	<input type="checkbox"/>
	Flexible or Modular Scheduling	<input type="checkbox"/>	<input type="checkbox"/>
	Summer School:	<input type="checkbox"/>	<input type="checkbox"/>
	a. Elementary Level	<input type="checkbox"/>	<input type="checkbox"/>
	b. Junior High Level	<input type="checkbox"/>	<input type="checkbox"/>
	c. Senior High Level	<input type="checkbox"/>	<input type="checkbox"/>

has been indicated above that this school
 a summer school program, enter the
 approximate summer school enrollment for
 summer 1969 in the appropriate space(s)

a. Elementary (K-6)

b. Secondary (7-12)

Education of Handicapped Children		Yes	No
Special Educational Programs For:	Mentally Handicapped	<input type="checkbox"/>	<input type="checkbox"/>
	Cerebral Palsy	<input type="checkbox"/>	<input type="checkbox"/>
	Blind	<input type="checkbox"/>	<input type="checkbox"/>
	Partially Sighted	<input type="checkbox"/>	<input type="checkbox"/>
	Brain Injured	<input type="checkbox"/>	<input type="checkbox"/>
	Emotionally Disturbed	<input type="checkbox"/>	<input type="checkbox"/>
	Deaf	<input type="checkbox"/>	<input type="checkbox"/>
	Hard of Hearing	<input type="checkbox"/>	<input type="checkbox"/>
	Physically Limited (or hospital case)	<input type="checkbox"/>	<input type="checkbox"/>
	Speech Handicapped	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	

17. Special Services Facilities

Special Services Facilities		Yes	No
Separate Facilities Provided For:	Attendance Service	<input type="checkbox"/>	<input type="checkbox"/>
	Psychological Service	<input type="checkbox"/>	<input type="checkbox"/>
	Guidance	<input type="checkbox"/>	<input type="checkbox"/>
	Social Work Service	<input type="checkbox"/>	<input type="checkbox"/>
	Health Service	<input type="checkbox"/>	<input type="checkbox"/>
	Corrective Reading	<input type="checkbox"/>	<input type="checkbox"/>
	Corrective Speech	<input type="checkbox"/>	<input type="checkbox"/>

18. Participation in Specially Funded Projects

Participation in Specially Funded Projects		Yes	No
Indicate the Source of Funds for Specially Funded Projects In Which Your School Participates	ESEA Title I	<input type="checkbox"/>	<input type="checkbox"/>
	ESEA Title II	<input type="checkbox"/>	<input type="checkbox"/>
	ESEA Title III	<input type="checkbox"/>	<input type="checkbox"/>
	Other Federal	<input type="checkbox"/>	<input type="checkbox"/>
	State	<input type="checkbox"/>	<input type="checkbox"/>
	Foundation	<input type="checkbox"/>	<input type="checkbox"/>
	Other	<input type="checkbox"/>	<input type="checkbox"/>

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SECONDARY SCHOOL REPORT

1969-70

Prepare three copies of this report. File one copy with the Bureau of Secondary School Supervision by October 15. Place a duplicate copy in school file. Denominational schools may send the third copy to diocesan superintendent or other authority.

School name Address ZIP Code

Denomination Order or congregation

Principal Assistant principal

Directress of studies Address

Diocesan superintendent Address

Underline type: Boarding, Day School, Boys, Girls, Coeducational

Does this school have a certificate of registration issued by the Board of Regents? (Check) Yes..... No.....

What secondary school grade is stated on the certificate (e.g., junior high school, four-year high school, six-year high school, etc.)? Date of latest registration.....

I. Enrollments and School Organization

1. Plan of organization (8-4, 6-6, 6-3-3, etc.).....

2. Enrollment by grades as of October 1

K	7
1	8
2	9
3	10
4	11
5	12
6	Special
Special	P.G.

Total (K-6) Total (7-P.G.).....

3. Total number of graduates in 1969.....

(a) Number qualified for Regents diplomas.....

(b) Number with 3 year Regents sequence in:

Foreign Lang. Homemaking.....

Mathematics Science

Business Education..... Music

Industrial Arts Art

(c) Number qualified for local diplomas only.....

(d) Number entered 4 year degree granting institutions.....

in New York State.....

outside New York State.....

(e) Number entered 2 year community colleges, junior colleges, or technical institutes.....

(f) Number entered other post-high school educational institutions.....

(g) Number of dropouts between July 1, 1968 and June 30, 1969 inclusive.....

4. School calendar

Number of days school will be in session.....

Date begins Date ends

School year

Thanksgiving recess

Christmas vacation

Spring vacation

Dates of other school closings

List:

.....

.....

.....

5. Daily session

(a) School day begins..... ends.....

If school operates overlapping sessions or double sessions, fill in the following:

Session 1 begins..... ends.....

Session 2 begins..... ends.....

Session 3 begins..... ends.....

(b) How many periods in the daily session (exclusive of lunch) are available for instruction?.....
for student activities?.....

(c) Length of:

class period

lunch period

activity period

(d) Length of pupils' school day (net).....

The Commissioner's recommendation is a minimum secondary school day of 5½ hours exclusive of the lunch period.

(e) Is English the language of instruction?..... If answer is "no," what language is used?.....

For how many hours a day?.....

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
BUREAU OF COLLEGE & UNIVERSITY EDUCATION
ALBANY, NEW YORK 12242

... ..

Signature of the Contractor: _____

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... ..

(Signature)

4

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100

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(e) Number of women physical education teachers by average daily pupil load

under 100.....	126-150.....	176-200.....
101-125.....	151-175.....	over 200.....

(c) Number of pupils enrolled last summer:

resident	_____
nonresident	_____

8. Credit given for instruction outside of school
Yes ☐ No ☐
If yes, indicate the area for which credit is given
Applied music ☐ Military reserves ☐ Religious edu-
cation ☐ Other _____

(Explain)

1. Supervisory and administrative staff. Persons on the staff of this school who provide administration and supervision on full-time or part-time basis. Count as supervision only the time spent in supervising and improving classroom instruction, cocurricular activities and pupil personnel services.

[illegible]

Teachers..... Librarians.....

School psychologists..... Other

Total secondary school staff (total of 1, 2, and 3) _____
 Number of staff members whose qualifications are
 equivalent to those of State certified teachers... _____
 Number of staff members whose qualifications are
 not equivalent to those of State certified teachers _____

Secretarial staff _____ Custodians _____
Cafeteria staff _____ Other (list) _____

What is tuition charge for day pupils?_____ for
boarding pupils?_____

III. Secondary School Program

(e) Indicate the courses offered in grades 7, 8, and 9. Next to each, indicate the number of weeks and number of periods a week. Write R or E to indicate whether the course is required or elective.

[illegible]

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V. Building and Equipment

1. Building

(a) Date of construction.....

(b) Date(s) of additions:.....

(c) Number of rooms used for:

Use	No.	Use	No.
Regular classrooms ..	_____	Science laboratories ..	_____
Agriculture	_____	Combination science	_____
Art	_____	classroom-	_____
Homemaking	_____	laboratories	_____
Mechanical drawing..	_____	Language labora-	_____
Music	_____	tories	_____
Shops	_____	Library	_____
Office practice	_____	Study hall	_____
Secretarial practice ..	_____	Gymnasium	_____
Typing	_____	Combination gym-	_____
Science rooms	_____	nasium-auditorium..	_____
		Swimming pool	_____

Total rooms used for secondary school program.. _____

(d) Total teaching stations for physical education _____

2. Library

(a) Titles No.

Added to shelf list last year.....

Removed from shelf list last year.....

Currently on shelf list.....

(b) Amount spent for library books last year....

Amount budgeted for library books this year _____

(c) Number of periodicals to which the library subscribes

(d) Does the library have the Reader's Guide?
(Check one) Yes ☐ No ☐

(e) What is the seating capacity of the library? _____

(f) How many periods a day is the library open exclusively for library use?.....

3. Audio-visual equipment for grades 7-12

Opaque projectors

Overhead projectors

Filmstrip and 2" x 2" slide projectors.....

16-mm. sound motion picture projector.....

Phonographs and record players.....

Tape recorders

Radio receivers

TV receivers

Microfilm readers.....

Other (specify)

Does the school have a central sound system? (Check) Yes _____ No _____

4. English and social studies equipment

List the equipment which is a standard part of each classroom in:

ENGLISH

SOCIAL STUDIES

_____	_____
_____	_____
_____	_____
_____	_____

5. Annexes or temporary quarters

(a) Is your school using annexes? (Check) Yes _____ No _____

(b) Address of annex No. rooms Grades Enrollment

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

VI. Outstanding Features

List what you consider to be the outstanding features of your school program. Please attach illustrative material, if possible.

(We would appreciate your sending us a copy of your report cards and school handbook.)

This report is complete and accurate to the best of my knowledge.

1. The first thing I noticed when I stepped out of the plane was the fresh air. It felt like I had been in a cocoon for hours. The sun was shining brightly, and the birds were singing. I took a deep breath and felt a sense of peace. I had been so stressed at work, but here, in the middle of nature, everything felt different. I walked along the path, feeling the grass under my feet. The sound of the water in the stream was soothing. I had found a little piece of heaven on earth.

2. The second thing I noticed was the smell of the flowers. They were in full bloom, and their fragrance filled the air. I stopped to pick a few and put them in my pocket. I wanted to take a little of this beauty home with me. The flowers were so colorful, and they looked so happy. I had never seen so many flowers in one place before. It was like a fairy tale come to life.

3. The third thing I noticed was the sound of the water. It was so clear and so pure. I had never heard water sound like this before. It was like a lullaby, and it made me feel safe. I sat on the bank and watched the fish swim in the stream. They were so small and so cute. I had never seen so many fish in one place before. It was like a little underwater world.

4. The fourth thing I noticed was the feeling of the sun. It was so warm and so bright. I had never felt the sun so good before. It was like a big hug, and it made me feel happy. I had never felt so relaxed before. I had found a little piece of heaven on earth.

5. The fifth thing I noticed was the feeling of the grass. It was so soft and so green. I had never felt the grass so good before. It was like a big bed, and it made me feel comfortable. I had never felt so at ease before. I had found a little piece of heaven on earth.

6. The sixth thing I noticed was the feeling of the air. It was so fresh and so clean. I had never felt the air so good before. It was like a big breath of fresh air, and it made me feel alive. I had never felt so energized before. I had found a little piece of heaven on earth.

7. The seventh thing I noticed was the feeling of the sky. It was so blue and so clear. I had never felt the sky so good before. It was like a big canvas, and it made me feel free. I had never felt so liberated before. I had found a little piece of heaven on earth.

8. The eighth thing I noticed was the feeling of the earth. It was so solid and so strong. I had never felt the earth so good before. It was like a big foundation, and it made me feel secure. I had never felt so grounded before. I had found a little piece of heaven on earth.

9. The ninth thing I noticed was the feeling of the universe. It was so vast and so beautiful. I had never felt the universe so good before. It was like a big mystery, and it made me feel curious. I had never felt so inspired before. I had found a little piece of heaven on earth.

10. The tenth thing I noticed was the feeling of myself. I was so happy and so content. I had never felt myself so good before. It was like a big reward, and it made me feel proud. I had never felt so accomplished before. I had found a little piece of heaven on earth.

11. The eleventh thing I noticed was the feeling of the world. It was so full and so alive. I had never felt the world so good before. It was like a big party, and it made me feel excited. I had never felt so joyful before. I had found a little piece of heaven on earth.

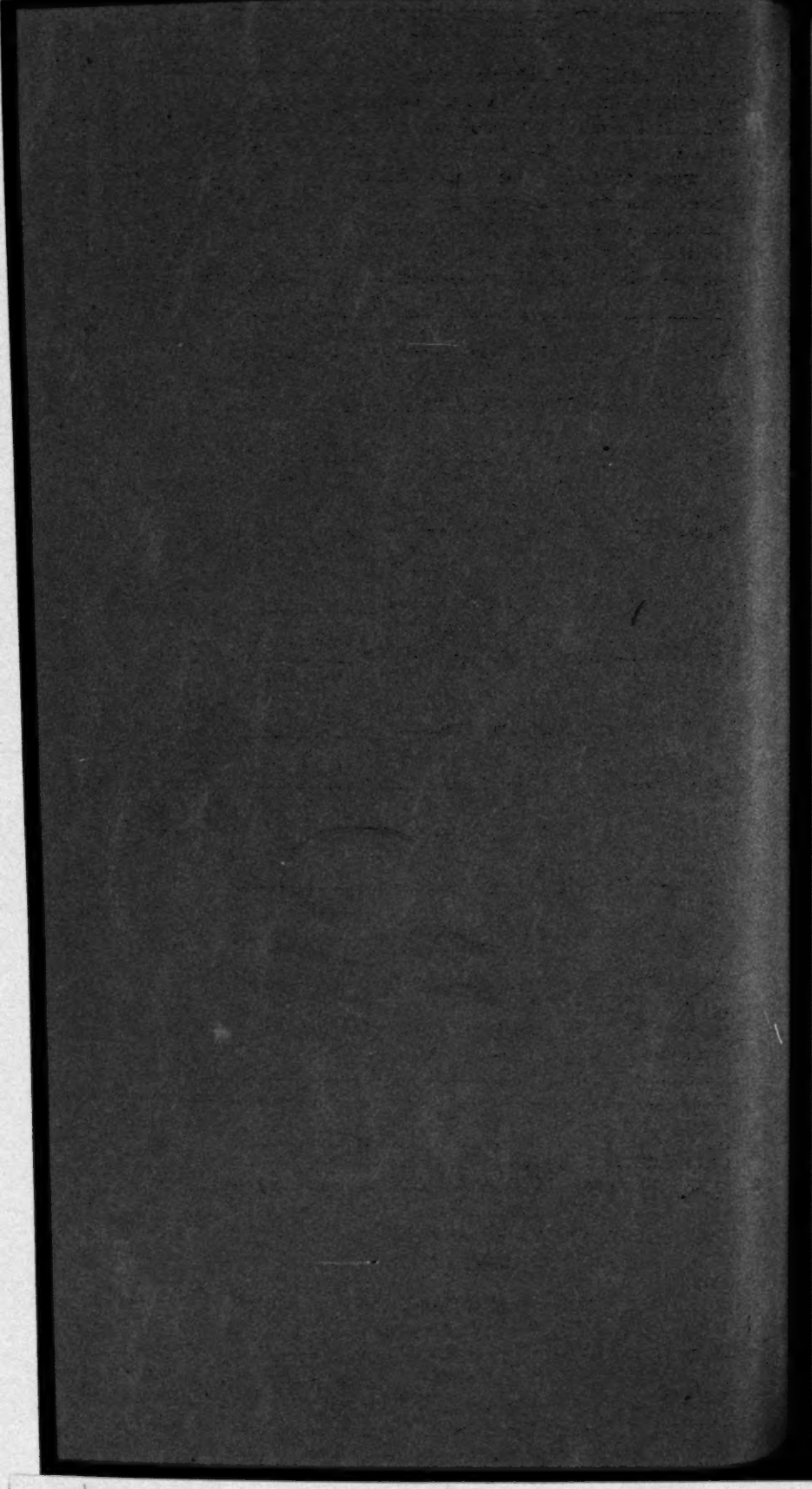
12. The twelfth thing I noticed was the feeling of the future. It was so bright and so hopeful. I had never felt the future so good before. It was like a big promise, and it made me feel optimistic. I had never felt so positive before. I had found a little piece of heaven on earth.

13. The thirteenth thing I noticed was the feeling of the past. It was so peaceful and so quiet. I had never felt the past so good before. It was like a big memory, and it made me feel nostalgic. I had never felt so sentimental before. I had found a little piece of heaven on earth.

14. The fourteenth thing I noticed was the feeling of the present. It was so perfect and so complete. I had never felt the present so good before. It was like a big gift, and it made me feel grateful. I had never felt so appreciative before. I had found a little piece of heaven on earth.

15. The fifteenth thing I noticed was the feeling of the universe. It was so vast and so beautiful. I had never felt the universe so good before. It was like a big mystery, and it made me feel curious. I had never felt so inspired before. I had found a little piece of heaven on earth.

EXHIBIT H(1)



INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with the Office for Nonpublic School Services by October 1. One copy should be retained by the school.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
OFFICE FOR NONPUBLIC SCHOOL SERVICES
WASHINGTON AVENUE
ALBANY, NEW YORK 12224

MANDATED SERVICES
APPLICATION FOR NONPUBLIC SCHOOL APPORTIONMENT
CHAPTER 138 OF THE LAWS OF 1970

1971-72 School Year

Form SA-170

1. Name of nonpublic school _____
2. Identification # _____
3. Location _____ N.Y. _____
No. and Street City, Town or Village Zip Code County
4. Mailing address of school _____ N.Y. _____
No. and Street Post Office Zip Code County
5. Name of corporate entity _____
6. Mailing address of entity _____ N.Y. _____
No. and Street Post Office Zip Code County
7. Date school registered _____
8. Registered name _____
9. Date entity incorporated _____
10. Incorporation name _____
11. Religious affiliation _____
12. Name of person completing this form _____
13. Telephone of person completing form _____

I, _____ the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a nonprofit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law. (NEW APPLICATION ONLY)

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3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.
4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.
5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:
 - a) Patriotism and citizenship for all pupils over eight years of age;
 - b) Correct use and display of the flag;
 - c) Physical training for all pupils over eight years of age;
 - d) Physiology and hygiene, including the nature and the effects on the human system of:
 - 1) alcoholic drinks
 - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years);
 - e) The provisions of the Constitution of the United States in the eighth and higher grades;
 - f) Highway safety and traffic regulations;
 - g) Fire prevention and fire drills;
 - h) Observe Conservation Day and provide instruction in this area;
 - i) The humane treatment of animals and birds (in the elementary grades);
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.
7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.
8. It is conducting three civil defense shelter drills during each school year.
9. It has submitted the attendance report AT6N, Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.
10. It has submitted the Pupil Evaluation Program Tests for third and sixth grades. Pupils who normally will be taking Regents or equivalent level courses are considered to be above the minimum competence level of the ninth-grade reading and arithmetic tests and may be excused from taking these tests.
11. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exemption.

and report to the town generated by the Commission in response to the findings of the working group.

The Government of the United States is

Five thousand and five hundred

5. Specific Instruction on how and provide instruction to this class:

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of Nevada:

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

1. The following information was obtained from the records of the FBI, New York, New York, dated 10/10/68, in connection with the investigation of the above-captioned matter:

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the activities of the British Communist Party in the United States.

...the results of the study are consistent with the findings of other studies that have shown that the use of a...
...the results of the study are consistent with the findings of other studies that have shown that the use of a...

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

State of New York

County of-----) ss
-----)

-----Chief Administrative
Officer of-----, being duly sworn,
deposes and says that all statements in this application are true
to the best of his knowledge.

Signature-----
Chief Administrative Officer

Title-----

I,-----, the undersigned
do certify that the corporate entity to which apportionments shall
be made in behalf of-----school
is as follows-----

and request that the Commissioner of Education approve such corporate
entity for the purposes of Chapter 138 of the Laws of 1970.

Signature-----
Chief Administrative Officer

Title-----

Subscribed and sworn to before me this-----
day of-----19__.

Notary Public

(All requests for information should be made to the Bureau of the Census, Washington, D.C. 20540)

Date of this report

1961

Number of copies of this report

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EXHIBIT H(2)

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Complete this form in pen or by typewriter.
The completed copy of this worksheet must be
filed with the DIVISION OF EDUCATIONAL FINANCE
on or before December 15. A second copy should be
retained at the school. The Guidelines contain
detailed instructions for completing this
worksheet.

THE STATE EDUCATION DEPARTMENT
DIVISION OF EDUCATIONAL FINANCE
STATE AIDED PROGRAMS
99 WASHINGTON AVENUE
ALBANY, NEW YORK 12210

FIRST APPORTIONMENT
NONPUBLIC SCHOOL
AVERAGE DAILY ATTENDANCE WORKSHEET
1971-72 SCHOOL YEAR FORM SA-171 (6/77)

Name of nonpublic school _____

Identification # _____ (leave blank)

Filing Address _____ N.Y.
No. and Street Post Office Zip Code County

Try 1. Computation of ADA for the first three months of the 1971-72 school year.
(Carry all computations for ADA to two decimal places without rounding.)

Attendance Months	Factors	Grades		
		1-6	7-8	9-12
PERIOD I SEPTEMBER	Possible Aggregate Attendance (1)			
	Aggregate Attendance (2)			
	Aggregate Attendance of Non-residents *(3)			
	Net Aggregate Attendance (2 minus 3) (4)			
	Actual Session for Sept. **(5)			
	ADA (4 divided by 5) (6)			
PERIOD II OCTOBER	Possible Aggregate Attendance (1)			
	Aggregate Attendance (2)			
	Aggregate Attendance of Non-residents *(3)			
	Net Aggregate Attendance (2 minus 3) (4)			
	Actual Session for Oct. **(5)			
	ADA (4 divided by 5) (6)			
PERIOD III NOVEMBER	Possible Aggregate Attendance (1)			
	Aggregate Attendance (2)			
	Aggregate Attendance of Non-residents *(3)			
	Net Aggregate Attendance (2 minus 3) (4)			
	Actual Session for Nov. **(5)			
	ADA (4 divided by 5) (6)			

*Non-resident is a student who is a non-resident of New York State
Actual session is the number of days school is in session and attendance is kept

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COMPUTATION WORKSHEET - Continued

try 2. Selection of best attendance month. Nonpublic schools may select the one attendance period from September, October and November that results in the highest apportionment.

Enter the month selected _____

a. Grades 1 - 6 _____
A.D.A.

b. Grades 7 - 8 _____
A.D.A.

c. Grades 9 - 12 _____
A.D.A.

(Month selected must be the same)

Enter the A.D.A. on the proper apportionment worksheet. Use SA-174 for nonpublic school aid under Chapter 138. Use SA-176 for aid under Chapter 822. If the Commissioner has determined that the nonpublic school is in a depressed area the school is to complete Form SA-177. The Form SA-177 will be sent only to those schools that have been identified as being eligible pursuant to Title IV the Higher Education Act of 1965.

Name of person filling out this form _____ Tel. No. (Area Code) _____

STATEMENT OF COMPLIANCE

I hereby certify that all pupils included in the attendance on this worksheet are enrolled in this nonpublic school and, that the records substantiating this data, as well as the attendance claimed will remain on file at the school for a period of fifty years.

I further certify that the information contained in this report is true and correct to the best of my knowledge.

Signature _____
Chief Administrative Officer

Title _____

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Nonpublic schools are also required to submit information with respect to pupil enrollment, pupil health records, Basic Educational Data System (BEDS) and to prepare a Secondary School Report.

Cost data as to these factors reported in 1971 by the Catholic Central High School in Lansingburg were as follows: 0:

Attendance	\$14,416.
Health Records	329.
BEDS	30.
Secondary School Report	<u>405.</u>
	\$15,180.

Catholic Central High School enrolls 1679 pupils, resulting in an average cost of \$8.58 per pupil for these purposes.

Data as to these same factors reported by St. Thomas Elementary School in Delmar in 1971 were as follows:

Attendance	\$2,300.
Health Records	100.
BEDS	10.
Secondary School Report	<u>12.</u>
	\$2,422.

This figure results in an average expenditure of \$7.21 for each of the 336 pupils enrolled.

Total nonpublic school enrollment for the school year 1970-71 was reported as 784,000. Using the above reported per pupil costs as being generally representative, State expenditures for these services would have been \$6,726,720 (using Catholic Central High School averages) or \$5,652,640 (using St. Thomas Elementary School averages).

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EXHIBIT I

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**FINANCIAL SUPPORT
NONPUBLIC SCHOOLS
NEW YORK STATE**

THE UNIVERSITY OF THE STATE OF NEW YORK

The State Education Department

Albany, New York 12224

October 1969

FINANCIAL SUPPORT

NONPUBLIC SCHOOLS

NEW YORK STATE

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department
Albany, New York 12224

October 1969

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of the University (with years when terms expire)

1984	Joseph W. McGovern, A.B., LL.B., L.H.D., LL.D., D.C.L., Chancellor	New York
1970	Everett J. Penny, B.C.S., D.C.S. Vice Chancellor	White Plains
1978	Alexander J. Allan, Jr., LL.D., Litt.D.	Troy
1973	Charles W. Millard, Jr., A.B., LL.D., L.H.D.	Buffalo
1972	Carl H. Pforzheimer, Jr., A.B., M.B.A., D.C.S., H.H.D. ..	Purchase
1975	Edward M. M. Warburg, B.S., L.H.D.	New York
1977	Joseph T. King, LL.B.	Queens
1974	Joseph C. Indelicato, M.D.	Brooklyn
1976	Mrs. Helen B. Power, A.B., Litt.D., L.H.D.	Rochester
1979	Francis W. McGinley, B.S., LL.B., LL.D.	Glens Falls
1980	Max J. Rubin, LL.B., L.H.D.	New York
1971	Kenneth B. Clark, A.B., M.S., Ph.D., Litt.D.	Hastings on Hudson
1982	Stephen K. Bailey, A.B., B.A., M.A., Ph.D., LL.D.	Syracuse
1983	Harold E. Newcomb, B.A.	Owego
1981	Theodore M. Black, A.B.	Sands Point

President of the University and Commissioner of Education
Ewald B. Nyquist

Deputy Commissioner of Elementary, Secondary and Continuing Education
Herbert F. Johnson

PREFACE

This report has been prepared in response to the request of Acting Commissioner of Education Ewald B. Nyquist who in July 1969 initiated a formal study of public financial support for nonpublic elementary and secondary schools. He was mindful of the expressions of financial distress being voiced by spokesmen for the nonpublic schools, and of the concern about this question, evidenced by other governmental officials.

The report is the result of considerable work by members of the Education Department, including Francis E. Griffin, Chairman, Fred Baruchin, Robert D. Stone, John P. Jehu, John J. Stiglmeier, Sherman N. Tinkelman, Norman D. Kurland, Joseph J. Caruso, Thomas J. Malesky, David D. Billmyer, Thomas H. Calvin, William B. Haessig and Homer Dearlove. Fred Baruchin was responsible for organizing much of the material into its final form.

Special acknowledgment is made to the many who supplied material appearing as appendices.

Herbert F. Johnson
Deputy Commissioner for
Elementary, Secondary and
Continuing Education

October 1969

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TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
Chapter I - Statistics Regarding Nonpublic Schools in New York State	2
Chapter II - Existing Programs of Public Assistance	8
Chapter III - Financial Crisis in Nonpublic Schools	20
Chapter IV - Possible Measures of Additional Support	21
Chapter V - Questions and Issues	34
Chapter VI - Legislative Developments in Other States	36
Bibliography	43
Appendices	

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INTRODUCTION

The Constitution of the State of New York requires that:

"The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated."

To carry out this mandate, the Legislature established local school districts and developed a system of free public schools, sharing with local districts the policy determination and the financial support of such schools.

Meanwhile, nonpublic schools were established in many communities under various auspices, some by religious denominations, some under other sponsorship. For a long time such schools received no public financial aid. Indeed, as for religiously sponsored schools, a constitutional provision was adopted forbidding such aid. The original provision was amended and Article XI, Section 3 of the New York State Constitution now reads:

"Neither the State nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

Under Constitutional interpretation and amendment, the Legislature has from time to time adopted legislation providing assistance to nonpublic schools and their students.

In recent years the problem of financing all education, public and nonpublic has become acute. Spokesmen for the nonpublic schools have expressed the view that they are serving the public interest and that they merit a larger measure of public financial support. They have pointed to the fact that other states have provided such assistance.

The questions thus raised have many ramifications. These are discussed in this report, in the hope that this information may be useful in reaching policy decisions of far-reaching importance for the State of New York.

CHAPTER I

STATISTICS REGARDING NONPUBLIC SCHOOLS IN NEW YORK STATE

PUBLIC AND NONPUBLIC SCHOOL ENROLLMENT TREND

Table 1 shows enrollment in public and nonpublic elementary and secondary schools for selected years from 1947-48 to 1968-69. Total elementary and secondary school enrollment increased by 87.7 percent during that period (2,275,280 in 1947-48; 4,270,395 in 1968-69), and the public schools showed a substantially larger percentage increase than did the nonpublic schools (92.1 percent public; 72.4 percent nonpublic).

As indicated in the table, the proportion of elementary and secondary school pupils attending nonpublic schools, while relatively constant from 1947-48 to 1957-58, has been decreasing slightly in the last 10 years (22.8 percent in 1957-58; 20.4 percent in 1968-69).

TABLE 1

ENROLLMENT IN PUBLIC AND NONPUBLIC SCHOOLS

GRADES K-12

NEW YORK STATE

1947-48 to 1968-69

School Year	Total	Public	Nonpublic	Nonpublic as Percent of Total
1968-69	4,270,395	3,397,678	872,717	20.4
1967-68	4,209,588	3,325,477	884,111	21.0
1962-63	3,808,168	2,960,568	847,600	22.3
1957-58	3,285,009	2,535,809	749,200	22.8
1952-53	2,705,036	2,087,370	617,666	22.8
1947-48	2,275,280	1,768,985	506,295	22.3

TABLE 2
NUMBER OF SCHOOLS AND ENROLLMENT IN NONPUBLIC SCHOOLS
BY GROUP AFFILIATION

NEW YORK STATE

FALL 1968

Group	Number of Schools	Enrollment				
		K-6	7-8	9-12	Total	% of Total
State Total	2,038	527,273	151,046	194,398	872,717	100.0%
Roman Catholic	1,415	452,154	131,548	158,462	742,164	85.0
Jewish	164	30,461	7,370	13,436	51,267	5.9
Lutheran	59	7,191	1,636	1,266	10,093	1.1
Episcopal	49	4,106	883	1,645	6,634	0.8
7th Day Adventist	37	1,329	453	535	2,317	0.3
Other Religions*	18	2,536	586	919	4,041	0.5
Total Nondenominational	296	29,496	8,570	18,135	56,201	6.4
Campus Schools	14	3,648	1,157	1,400	6,205	0.7
Other Nondenominational	282	25,848	7,413	16,735	49,996	5.7

*Includes Society of Friends, Mennonite, Greek Orthodox, Russian Orthodox, Methodist and Baptist.

NUMBER OF NONPUBLIC SCHOOLS AND ENROLLMENT BY GROUP AFFILIATION

As reported in Table 2, the total number of nonpublic elementary and secondary schools in New York State was 2,038 in the fall of 1968. It may be seen that a majority of these (69.4 percent) were Roman Catholic schools, and that a great number of the remaining schools were operated by other religious groups. It should be noted that, in 1968-69, 11 religious denominations operated elementary and secondary schools in the State, and that nondenominational schools accounted for only 14.5 percent (296 schools) of the total number in operation.

Table 2 shows that in 1968-69, 85 percent of nonpublic school pupils in New York State attended Roman Catholic schools.

Schools of other religious denominations contained an additional 8.6 percent of the enrollment (Jewish, 5.9 percent; Lutheran 1.1 percent; Episcopal, .8 percent; 7th Day Adventist, .3 percent; Other Religions, .5 percent). Nondenominational schools accounted for only 6.4 percent of the total.

Appendix A provides a more detailed view of nonpublic enrollments, showing enrollments by grade as well as in subgroups of major affiliations.

NONPUBLIC SCHOOL ENROLLMENT IN THE "BIG SIX" CITIES

In 1968-69, well over half (61.6 percent) of the pupils enrolled in nonpublic schools in New York State attended schools in the "Big Six" cities of Albany, Buffalo, New York, Rochester, Syracuse and Yonkers. Table 3 shows the distribution of enrollment among the "Big Six" cities and for the rest of the State by grade group. It may be seen that New York City alone had slightly more than half the enrollment (51.4 percent), and an additional 10.2 percent was accounted for by the other large cities (Buffalo, 4.3 percent; Rochester, 1.9 percent; Albany, 1.5 percent; Yonkers, 1.3 percent; Syracuse, 1.2 percent).

The "Big Six" cities contained a slightly higher proportion of the secondary nonpublic school enrollment as compared with the elementary school enrollment in 1968-69 (secondary, 63.3 percent; elementary, 61.2 percent). In all six cities, a fairly large percentage of the nonpublic enrollment was comprised of pupils who were not residents of the public school district in which the nonpublic schools were located. The percentage of nonresident attendees ranged from 9.0 percent in Yonkers to 16.0 percent in Buffalo.

A more detailed distribution of nonpublic school enrollment by geographic location is contained in Appendix B, which shows enrollment by grade and county in 1968-69.

TABLE 3

NONPUBLIC SCHOOL ENROLLMENT IN THE "BIG SIX" CITIES
NEW YORK STATE
1968-69

	K-8		9-12		Total Enrollment	Percent of total	Percent* Nondistrict Residents
	Enrollment	Percent of Total	Enrollment	Percent of Total			
Big Six Cities							
Albany	8,554	1.3 %	4,359	2.2 %	12,913	1.5 %	15.0 %
Buffalo	27,237	4.0	10,277	5.3	37,514	4.3	16.0
New York	344,984	51.0	103,794	52.8	448,778	51.4	11.0
Rochester	14,180	2.1	2,846	1.4	17,026	1.9	13.0
Syracuse	8,545	1.3	2,089	1.1	10,634	1.2	15.0
Yonkers	10,138	1.5	955	0.5	11,093	1.3	9.0
Total Big Six	413,638	61.2	124,320	63.3	537,958	61.6	--
Rest of State	262,673	38.8	72,086	36.7	334,759	38.4	--
TOTAL	676,311	100.0	196,406	100.0	872,717	100.0	19.0

* 1967-68 figures

INSTRUCTIONAL STAFF IN NONPUBLIC SCHOOLS

As reported in Table 4, in 1968-69 there were 43,053 professional staff members in the nonpublic schools of New York State. The great majority of these (81.1 percent) were classroom teachers. Principals accounted for 5.4 percent of the total number of personnel, while supervisors and department heads constituted 4.9 percent of the total; the remaining 8.6 percent occupied other types of professional positions. Of the total number of positions, 38,923 (90.4 percent) were full-time and the remaining 4,130 were occupied by individuals who worked only part-time.

When related to enrollment information contained in Table 1, instructional staff data yielded the following ratios: nonpublic school pupils to teachers, 25.0:1; pupils to all other professional staff members, 107.4:1; pupils to total professional staff, 20.3:1.

TABLE 4
INSTRUCTIONAL STAFF IN NONPUBLIC SCHOOLS
NEW YORK STATE
FALL 1968

Position	Full-Time	Part-Time	Total
Principals	2,141	170	2,311
Supervisors and Department Heads	1,752	370	2,122
Classroom Teachers	32,442	2,482	34,924
Other Professional Positions	2,588	1,108	3,696
TOTAL	38,923	4,130	43,053

NONPUBLIC SCHOOL SIZE

Selected enrollment size percentiles for nonpublic schools are reported in Table 5. It may be seen that the median enrollment size for nonpublic elementary schools was 296 in 1968-69, and the corresponding figure for secondary schools was 195. For both elementary and secondary schools, Roman Catholic schools tended to be larger in enrollment than other types of nonpublic schools. The median enrollment for Catholic elementary schools was 366 as compared to 142 for other nonpublic elementary schools; Catholic secondary schools had a median enrollment size of 310, while the figure for other nonpublic secondary schools was only 195.

Overall, nonpublic schools tended to be small in size. Among elementary schools, 25 percent contained 168 or fewer pupils, while 25 percent of the secondary schools had 79 or fewer pupils enrolled. Only 10 percent of the elementary schools contained 885 or more pupils; similarly, 10 percent of the nonpublic secondary schools had enrollments of 904 or more pupils.

TABLE 5
NONPUBLIC SCHOOL SIZE

NEW YORK STATE

1968-69

Selected Percentiles	Elementary Schools			Secondary Schools		
	Roman Catholic	Other	Total	Roman Catholic	Other	Total
10th	153	29	79	32	18	24
25th	248	61	168	99	59	79
50th	366	142	296	310	111	195
75th	650	235	548	630	206	469
90th	970	366	885	1,121	351	904

CHAPTER II

EXISTING PROGRAMS OF PUBLIC ASSISTANCE

Various aids are presently provided for nonpublic schools and the children who attend them. A brief description of these measures and the expenditures involved are summarized in this Chapter.

Transportation

School districts are required to provide transportation to nonpublic school children on the same basis as for their public school children. Specifically, the law states: "In providing or granting transportation for children, sufficient facilities shall be provided for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children."

The State reimburses the school district for 90% of approved cost of transportation of those children who reside at least $1\frac{1}{2}$ miles from the schools they attend. This aid will be reduced to district aid ratio in 1970-71.

The law also requires that a district must transport children who reside the following distances from their schools:

Elementary level	-	grades K-8	-	2-10 miles
Secondary level	-	grades 9-12	-	3-10 miles
Handicapped (from school age to 21 years of age)	-	where needed	-	up to 20 miles

Transportation Expenditures

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$157,142,119	\$134,142,119	\$23,000,000

Health Services

Except for Rochester, Buffalo, and New York, which receive local Health Department services, all districts in the State are required to provide certain health services for children in private schools to the extent such are provided for the public schools and are requested by the nonpublic schools.

Services and equipment include:

- Annual medical inspection
- Dental hygiene inspection and prophylaxis
- School nursing services, vision and hearing tests
- Examinations for employment certificates
- Examinations for participating in athletics
- Notification of parents concerning defects and follow-up
- Instruction for first aid care for school emergencies
- Scales, first aid supplies
- Vision and hearing test devices
- Health record forms

Health Services Expenditures

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$41,458,601	\$32,458,601	\$9,000,000

Loan of Textbooks

Subdivision 3 of Section 701 requires all school boards to purchase and to loan, upon individual request, textbooks to all children residing in the district who are attending grades seven through twelve in public and nonpublic schools. Textbooks are defined by the statute so as to eliminate reference books, workbooks, and certain other items.

The textbook must be non-sectarian (this eliminates denominational editions and those carrying the "imprimatur" or "nihil obstat" of a religious authority), and the textbook must be "designated for use in any public elementary or secondary school of the State or . . . approved by any school board."

The textbooks must be "loaned free" to the children, but school boards may make reasonable rules and regulations. Such rules and regulations may contain requirements for reimbursement, by the student to the school district, for damage, loss or destruction of loaned textbooks.

At present no district is required to purchase or otherwise acquire textbooks, under this section, at a total cost to the district in excess of \$10 multiplied by the total number of resident students in grades 7-12, of public schools and private schools. The schools must comply with the provisions of the Compulsory Education Law., i.e., must provide at least substantially equivalent education services and facilities (in the judgment of the school board of the district where the nonpublic school is located.)

Textbook (Secondary Schools) Expenditures

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$18,500,000	\$13,500,000	\$5,000,000

School Lunch Service

Funds from State appropriations may be used to reimburse sponsors of non-profit school lunch, special milk, or other school child feeding programs to the extent that Federal funds apportioned to the State of New York are insufficient to provide the full reimbursement to which sponsors may be entitled. School lunch reimbursement is 9 cents per Type A lunch served to children; approximately $4\frac{1}{2}$ cents represents State subsidy.

Children of a non-profit private and parochial school of high school grade or under within the definition of the Statutes of the State of New York and exempt from income tax under the Internal Revenue Code as amended, are eligible to participate.

All private and parochial schools must meet the same eligibility requirements as public schools:

- o operate the school lunch program on a non-profit basis for all children regardless of race, color, or national origin;
- o serve nutritious lunches that meet the requirements of the Type A menu pattern;
- o provide lunches free or at a reduced price to children who are determined by local school authorities to be unable to pay the full price of lunch; and,
- o submit a policy statement concerning free and reduced price meals.

School Lunch

1967-68

State Funds

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$11,109,355	\$10,294,518	\$814,837

Federal Funds

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$10,880,179	\$10,099,580	\$780,599

Payments for the Special Milk Program were wholly from Federal funds and were as follows:

\$7,667,230	\$1,466,601
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Attendance

Public school districts are responsible for attendance of children in school under the Compulsory Education Law. Beyond enforcing the law they strive to promote good attendance in order that every child's educational experience should be most valuable. Each district, therefore, provides attendance services to cover all children, including those attending nonpublic schools. Attendance teachers are ordinarily used for this purpose, visiting homes of children as needed. Referrals are made by the schools and attendance personnel follow up by home visits as required. Nonpublic schools generally refer only those cases they feel are most severe.

Attendance Expenditures

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$10,852,470	Not Available	Not Available

Census

The Education Law provides that a school census, which shall include all minors between birth and 18 years of age and shall particularly note any children between birth and 21 years of age who are deaf or blind or suffering from any other crippling condition and mental defects, shall be taken on August 30th of each year in each school district except the six largest cities. (Sec. 3243)

Cities generally maintain a continuous census of children enrolling in public and nonpublic schools, while some cities attempt to utilize local agencies concerned with vital statistics.

Census Expenditures

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$791,480	Not Available	Not Available

Testing

The New York State Pupil Evaluation Program (PEP) is a Statewide testing program that provides teachers, schools, and the State Education Department an annual inventory of pupil achievement. Used in the program are standardized tests of achievement based on New York State courses of study. The Readiness, Reading and Arithmetic Achievement tests are administered at the beginning of each school year to pupils in every school, public and nonpublic, in New York State in grades 1, 3, 6, and 9.

The PEP testing is supplemented by achievement tests of various kinds.

The Purpose is to Provide the

Teacher	With test results for immediate use in planning instruction at the beginning of the school year
School	With a complete summary of all scores, along with pertinent, related data for meaningful interpretation of pupil achievements
System	With summary and interpretive data for each school, and with systemwide summaries and interpretive reports
State Education Department	With an extensive data bank of test information and with Statewide summaries which will provide broad views of pupil achievements and needs

Regents Scholarship examinations are additional components of the State testing program.

1967-68

Pupil Evaluation Program

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$335,000	\$268,000	\$62,000

Standardized Testing Program

\$ 94,000	\$ 76,300	\$17,700
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Regents Scholarship Program

\$250,000	\$203,000	\$47,000
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Regents Examinations

Regents examinations are end-of-course achievement examinations in grades 9-12, based on New York State courses of study. They are offered three times a year (January, June, and August) and cover 25 high school subjects. General use of Regents examinations, which are designed for pupils of average and above-average ability, is required in the public high schools of the State and made available to nonpublic schools. Each year more than 1,300,000 examination papers are written by 525,000 pupils in approved public and private high schools.

Regents examinations provide the school with a yardstick for evaluating pupil progress. They provide a supervisory instrument intended to stimulate high academic achievement and quality teaching throughout the State. Regents examinations also constitute a device for predicting success in further study, both in high school and in college.

In accordance with Section 28 (3.35) of the Regents Rules relating to apportionment, schools receiving State aid shall make general use of Regents examinations or approved equivalent examination in the senior high school grades, though it is not required that public schools must administer Regents examinations to all students.

Regents Examinations Expenditures

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$292,000	\$237,000	\$55,000

Total Testing Services to Schools

1967-68

	Regents Exams Administered	Standardized Testing Program	Pupil Eval. Prog.	Regents Scholar- ship Prog.	Total
Public	\$237,000	\$76,300	\$268,000	\$203,000	\$784,300
Nonpublic	55,000	17,700	62,000	47,000	181,700
Total	292,000	94,000	330,000	250,000	966,000

Severely Handicapped Children

State Assistance for Instruction to Severely Handicapped Children Under the Provisions of Section 4407

Section 4407 authorizes the State Education Department to contract with a nonpublic educational facility located within or without the State for instructional services for certain handicapped children when adequate public facilities are not available for such children. Thus far the State has assumed the cost of instruction up to the maximum \$2,000 per year allowed for each eligible child. The payments have been made directly to the private school with which the State has contracted after a site visit to the school to determine its eligibility to receive these funds.

(a) Eligibility of Pupils. Satisfactory evidence must be provided that:

- (1) The child for whom assistance is requested is of school age.
- (2) There is present an unusual type of handicap or combination of handicaps.
- (3) An application has been made to the public school system for instruction and that there is no adequate public school program available within the State.
- (4) Adequate medical and/or psychological examinations have been made.
- (5) Such child can be expected reasonably to benefit from instruction.

(b) Eligibility of Schools

- (1) The nonpublic school for attendance at which assistance is requested has an adequate and suitable special education program and has been registered with the Department after a site visit to the facility.
- (2) A facility located outside the State may be approved based on recommendations made by qualified public officials of the State where the school is located.

The amendment to Section 4407 as incorporated in Chapter 171, Laws of 1969, which becomes effective July 1, 1969, now provides that the school district or residence of the handicapped child for whom this service is provided must contribute to the cost of each child's tuition. The amount per child to be paid by the school district will be the difference between the district's per pupil operating expenditure, not to exceed \$760, and the operating expense aid per pupil.

The school district's share of the cost of this program will be deducted each year from the State aid otherwise payable to the district.

It is expected that approximately 4,000 handicapped children will receive the financial benefits offered under this Law for the 1968-69 school year.

Handicapped Pupils (Section 4407) Expenditures

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$8,000,000	None	\$8,000,000

Orphan Schools

Pursuant to Section 4001 of the Education Law, nonpublic schools operated by the incorporated Orphan Asylum Societies (except in New York City) receive one-half of each approved teacher's salary up to \$4000. If fewer than 10 pupils are enrolled in the class, \$400 is paid per pupil in ADA.

Orphan Asylum School (Section 4001) Expenditure

1967-68

<u>Total</u>	<u>Public</u>	<u>Private</u>
\$190,537	None	\$190,537

Home Instruction

Home instruction, where required, is available to students attending nonpublic schools. A student requiring home teaching must apply to the public school system serving the area in which he resides. His application is considered the equivalent of enrollment in the public schools for the purpose of receiving home instruction.

Home Instruction Expenditures

1967-68

<u>Public</u>	<u>Private</u>
No estimate available	No estimate available

Summer School

Summer elementary schools enroll children regardless of whether they were enrolled in public or private institutions during the regular school year. Some schools charge all their summer students the three dollar registration fee for elementary summer school. Most make no charge.

No figures are kept for the numbers of children from private schools enrolling in public summer schools. No State funding is given at all to private summer schools.

Summer School Expenditures

1967-68

Public

No estimate available

Private

No estimate available

Section 3210, subdivision 2-b Absence provides that absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules established by the commissioner.

Regulations of the Commissioner of Education

Section 154. (1092) Absence from School

1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.
2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.
3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.
4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.
5. Such absence shall be for not more than one hour each week at the close of either the morning or afternoon session or both at a time to be fixed by the local school authorities, provided that the time designated for each separate unit, the primary grades (K-3), intermediate grades (4-6), junior high school grades (7-9), and senior high school grades (10-12) shall be the same for all pupils in that unit in each separate school.
6. In the event that more than one school for religious observance and education is maintained in any district, the hours for absence in each particular public elementary or secondary school unit in such district shall be the same for all such religious schools.

No cost involved

Table 6

Expenditure for Respective Service Areas

State and Local Revenues

1967-68

Amount to

<u>Item</u>	<u>Total</u>	<u>Public School Pupil</u>	<u>Private School Pupil</u>
Transportation	157,142,119	134,142,119	23,000,000
Health Service	41,458,601	32,458,601	9,000,000
Textbooks (Secondary schools)	18,500,000	13,500,000	5,000,000
School Lunch	11,109,355	10,294,518	814,837
Attendance	10,852,470	N.A.	N.A.
Census	791,480	N.A.	N.A.
Testing Services to Schools	966,000	784,300	181,700
Regents Examinations	(292,000)	(237,000)	(55,000)
Standardized Testing Program	(94,000)	(76,300)	(17,700)
Pupil Evaluation Program	(330,000)	(268,000)	(62,000)
Regents Scholarship	(250,000)	(203,000)	(47,000)
Handicapped - Section 4407	8,000,000	----	8,000,000
Orphan Asylum Schools - Section 4001	190,537	----	190,537
Home Instruction	N.A.	N.A.	N.A.
Summer School	N.A.	N.A.	N.A.
<u>Federal Funds</u>			
E.S.E.A.			
Title I	89,000,000	79,800,000	9,200,000
Title II	6,327,119	4,939,119	1,388,300
Title III			
School Lunch	10,880,179	10,099,580	780,599
School Milk	9,133,831	7,667,230	1,466,601

CHAPTER III

FINANCIAL CRISIS IN NONPUBLIC SCHOOLS

Appeals for additional public assistance for nonpublic schools have been made with increasing frequency in recent years. A spokesman for the Catholic Schools appeared before the Regents at its Legislative Hearing on September 5, 1969 and made a very strong plea for such support. (Appendix C). This was followed by a more complete statement of the Catholic School position in a booklet entitled "Another Aspect of the Financial Crisis in Education." (Appendix D).

No formal appeal has been received from the schools sponsored by other religious denominations. There is every reason to believe, however, that they too are finding their resources strained. An indication is an interview with a spokesman for the Hebrew Schools, quoted in the Albany Times Union of October 4, 1969. (Appendix E).

Even the "independent schools," which have been thought to be in the strongest financial position, are encountering difficulties. Last year the Peekskill Military Academy, one of the best known institutions of its kind in the country, was forced to close its doors because it had exhausted its resources. The Collegiate School of New York City, a long established and well known preparatory school, is in financial difficulty, according to its Head Master, as reported in the New York Times of September 21, 1969. (Appendix F).

Private schools are not required to follow uniform accounting practices or to make public reports of their financial affairs or the resources available to them. It is not possible, therefore, to ascertain the degree of need which exists in each school.

If any additional aid should be provided for nonpublic schools, it would presumably have to be made available to them all, on the basis of equity of treatment and because all are undoubtedly in need of assistance. As described in Chapter II, every present financial aid measure applies to all nonpublic schools. Such aid would, of course, also apply to nonpublic schools which would hereafter be established.

If any proposal for variable aid adjusted to each school's financial resources were to be considered, it would obviously be necessary to secure detailed information regarding each school's financial condition.

POSSIBLE MEASURES OF ADDITIONAL SUPPORT

Various suggestions have been advanced for rendering additional public assistance to New York State's nonpublic schools. Those most frequently mentioned are:

- Extending free textbook aid to pupils in elementary schools
- Providing pupil personnel services (guidance, psychological, speech correction)
- Providing remedial instruction in various subjects.
- Dual enrollment - permitting nonpublic school students to attend public schools part time
- Granting tuition scholarship to all nonpublic school students
- Aiding nonpublic schools directly.

Each of these will be examined briefly in this chapter with reference to legal and other pertinent considerations.

TEXTBOOKS FOR STUDENTS IN GRADES K-6

In 1966 the New York State Legislature mandated school districts to provide textbooks free to all pupils in grades 7 to 12 in both public and nonpublic schools. The State provides full reimbursement for cost of books up to a limit of \$10 multiplied by the number of pupils (but not for administrative expenses.)

It has been proposed by some that free textbooks be supplied henceforth at public expense to pupils in elementary schools as well.

Relevant Considerations

1. Some nonpublic school authorities say textbook aid does not help their schools because parents had always been required to buy their children's books anyway. Thus they say the law helps the parents but not their schools.
2. Publicly supported textbooks must avoid sectarian emphasis. Their use tends to weaken the sectarian thrust of nonpublic schools which may be religiously affiliated.
3. Under New York State law textbook purchases for resident pupils enrolled in grades 7-12 of public and nonpublic schools are "ordinary contingent expenses." Thus, in cases where budgets are not approved by the voters, it is the duty of the board of education to purchase and loan textbooks nevertheless. State aid paid is on the basis of actual expenses but not to exceed \$10 per resident pupil enrolled in grades 7 to 12. If the law were to be extended to cover elementary school pupils, such expenditures would also become "ordinary contingent expenses."

4. Questions of definition would be encountered. Under present State Guidelines, "A textbook is a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends. Textbooks acquired under this law shall be those which are primary sources of study materials intended to implement a major part of a State curriculum or a State-approved local curriculum." Excluded under this Act are reference materials, supplementary materials, workbooks, testing materials, teacher's editions and review books. These definitions would have to be reviewed, especially the exclusion of workbooks, since these frequently constitute a significant supplement to elementary classroom texts.
5. Cost estimates: If this service were made available for youngsters of the elementary grades in private schools, it would of necessity have to be made available to public school students as well. Financial estimates are therefore as follows:

Est. Nonpublic pupils	527,000	x	\$10	=	\$5,270,000
Est. Public pupils	1,900,000	x	\$10	=	\$19,000,000

Legal Aspects

Implementation of this proposal would require amendment of Education Law section 701, which presently limits the loan of textbooks to pupils in grades seven through twelve. The constitutional propriety of the loan of textbooks to pupils in nonpublic schools has been established by the New York Court of Appeals and the United States Supreme Court in East Greenbush v. Allen, 20 N.Y.2d 109, 392 U.S. 236 (1967).

PROVIDING PUPIL PERSONNEL SERVICES

It has been suggested that pupil personnel services (guidance, psychological, speech therapy, etc.) not directly related to instruction in specific subjects, be furnished to nonpublic school pupils at public expense. In fact, it has been contended that such services could be construed to fall under a broad definition of health services.

Relevant Considerations

1. As with textbooks it could be argued that this assistance would not be of significant help to schools in meeting their financial burdens inasmuch as most of them do not provide such services now. The services would of course help children.

2. Cost estimates:

K-12 guidance	872,000 pupils x \$15	= \$13,080,000
K-12 psychological	872,000 pupils x \$ 2.50	= 2,180,000
K-12 speech therapy	872,000 pupils x \$ 8	= 6,976,000

Legal Aspects

In evaluating this proposal from the legal standpoint, a distinction should be made between those services which may fairly be characterized as health services and services to the handicapped, and those which are primarily instructional in nature and are provided without regard to handicap.

New York State Constitution Article VII, section 8, provides that nothing contained in the State Constitution shall prevent the Legislature "...from providing for the...education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the mentally retarded or juvenile delinquents as it may deem proper; or for health and welfare services for all children, either directly or through subdivisions of the State, including school districts..."

Education Law section 912 implements Article VII, section 8 by providing as follows:

"The voters and/or the trustees or board of education of a school district, shall provide resident children who attend schools other than public with all or any of the health and welfare services and facilities, including but not limited to health, surgical, medical, dental and therapeutic care and treatment, and corrective aids and appliances, authorized by law and now granted or hereafter made available by such voters and/or trustees or board of education for or to children in the public schools in so far as these services and facilities may be requested by the authorities of the schools other than public."

It is clear from the foregoing that Article XI, section 3 of the State Constitution presents no barrier to the provision of health services for all children, whether enrolled in public or nonpublic schools. In view of the holding and language of the majority of the United States Supreme Court in East Greenbush v. Allen, it is unlikely that the courts would find that either the present provisions of section 912, or any extension of those provisions within the limitations of Article VII, section 8, would offend the First Amendment of the United States Constitution.

With respect to those types of pupil personnel service which are not related to health or handicap, the legal questions will be essentially those presented by the "shared time" or dual enrollment" concept and will be discussed in this paper under the heading "Dual Enrollment."

PROVIDING REMEDIAL SERVICES

It has been suggested that remedial teachers be provided at public expense in nonpublic schools.

This differs from the previous proposal in that it is directly related to instruction in specific subjects.

Relevant Considerations

A philosophical problem arises here. If it is justifiable to provide publicly supported remedial instructors for children who are encountering difficulty in a subject, why not provide the entire instruction initially? Do not all students encounter difficulty to some degree?

Also, would public school teachers assigned to remedial teaching in nonpublic schools sometimes find themselves required to reinforce teaching which had sectarian emphasis, especially in English and Social Studies?

Cost estimates:

K-12 Remedial teaching	872,000 x \$5	= \$4,360,000
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Legal Aspects

A proposal to provide remedial services to pupils in nonpublic schools presents essentially the same legal questions as are discussed in this paper under "Dual Enrollment."

DUAL ENROLLMENT

This has been defined as an arrangement which permits a student to attend a public school part time and a nonpublic school part time, concurrently pursuing each part of his elementary or secondary program of studies under the direction and control of the respective public or nonpublic school.

Various other terms which have been used are "shared time", "educational cooperation" and "dual registration." In dual enrollment arrangements, public schools provide instruction for nonpublic school students in subjects usually regarded as secular such as mathematics, vocational, technical, laboratory science and "home economics." English and social studies are usually considered value subjects and taught by the parochial schools. Dual enrollment programs currently in operation in various parts of the nation are mainly on the secondary level.

This plan generally does not include a provision for a reverse arrangement whereby public school students would attend a parochial school for any classes.

If the dual enrollment concept were to be implemented, it might be applied to services provided through Boards of Cooperative Educational Services as well as the programs of school districts themselves.

Relevant Considerations

Financial implications are difficult to estimate:

Costs - Dual Enrollment - BOCES

BOCES services generally cover the education of handicapped children and vocational education. Presumably the full range of services would be included. If we assume that nonpublic school pupils would use the services in the same proportion as those in public schools, the cost of occupational education alone might be estimated:

Nonpublic school students involved might approximate 8,000.
Cost \$800 each - Estimated total \$6,000,000.

This is a minimal figure which does not include such things as the need for additional space, maintenance, transportation, building costs, or amortization of facilities. An important and practical concern relates to the overtaking of present facilities, which in many instances, are already overcrowded. Some additional expenditures would be incurred for BOCES services to handicapped children, but nonpublic schools have traditionally enrolled relatively few such children.

Costs - Dual Enrollment - Local Districts

Presently 20 villages and 23 cities, apart from the "Big Six Cities" are not members of BOCES. Programs which could be included in shared time arrangements in these districts could embrace all present curricular offerings, excluding only religious courses, English and social studies. No reliable estimate of costs is feasible at this time.

Costs - Dual Enrollment - Big Six Cities

For occupational education alone, assuming an enrollment of 40,000 to 43,000 pupils from the nonpublic schools and an average cost of \$800 to \$1000 per pupil, the total cost would be in excess of \$40,000,000. This does not include building, transportation or additional costs. Some additional expenditures for handicapped children would be involved.

Extension of dual enrollment to other curricular offerings would entail additional costs.

Public financing of dual enrollment classes would presumably be shared by the student's home district and the State. This would, of course, require changes in State Aid Laws to permit counting attendance of part-time students. The financial impact of the local share would vary greatly from district to district, causing heavier financial strain in districts which have a large proportion of students enrolled in nonpublic schools. Careful study would be required in order to ascertain implications for each district.

Administrative problems would be encountered when children from nonpublic schools were brought into the public schools part time. Even if the schools were located near each other there would be questions of:

- Transportation
- Scheduling of classes
- Adequacy of facilities
- Attendance, reporting of pupil progress, awarding of course credits, diplomas, etc.
- Billing and collecting tuition from home districts when nonpublic students reside elsewhere than in the district in which the nonpublic school is located.

Administrative problems would be increased if the distances between schools is greater. Dual enrollment might then require that the public school district lease space within the nonpublic schools itself and send public school teachers in to teach the designated subjects. Thus in effect a portion of the nonpublic school would become public school premises for that period.

Shared time arrangements have been established in various states, as pointed out in Chapter VI. An interesting evaluation of shared time experimentation in Chicago is described in (Appendix G).

Apart from financial and administrative considerations, many arguments for and against dual enrollment have been advanced by proponents and opponents. They include:

Arguments for Dual Enrollment

The dual enrollment concept is believed to be a constitutional means of settling the controversy over general public aid to elementary and secondary schools.

Dual enrollment is not a new idea; it has operated in many parts of the United States and has been received favorably.

It would provide a more satisfactory educational opportunity for all pupils than is possible under present arrangements.

Educational facilities would be used more extensively.

All children would benefit from the experience of association with each other, thus promoting intergroup understanding.

Cooperation between public and nonpublic schools would be enhanced.

Authorization of shared time arrangements would offer all religious groups a better opportunity for providing religious instructions for their children by avoiding the all or nothing choice now required.

Shared time would reduce the pressure for religious observance and teaching in the public schools.

Arguments Against Dual Enrollment

Dual enrollment programs would make it difficult to achieve a desirable correlation within the whole curriculum.

Public schools would need additional facilities and staff.

Shared time might create intergroup problems if students were identified by religious preference.

Shared time might require a longer school day and a longer school year.

Public and nonpublic authorities would be required to reach difficult decisions, sometimes involving school prestige.

Shared time would present for children from small nonpublic schools a more complicated educational environment.

Selection of neutral or value courses varies among nonpublic school education.

Legal Aspects

The New York State Attorney General, in an opinion rendered to the Commissioner of Education in 1965, ruled that Article XI, section 3 of the State Constitution prohibits the use of State or local property, credit or funds for dual enrollment programs involving pupils enrolled in sectarian schools. The Attorney General rejected any distinction between regular instruction and remedial instruction, and held that both would constitute aid to sectarian schools and is therefore prohibited.

In reaching his conclusion, the Attorney General relied heavily upon the decision of the United States Supreme Court in Judd v. Board of Education,

278 N.Y. 200 (1938), which interpreted Article XI, section 3 in the following language:

"Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. 'It helps build up, strengthen and make successful the schools as organizations.'"

In East Greenbush v. Allen 20 N.Y.2d 109 (1967), a four member majority of the Court of Appeals, in upholding the validity of New York's Textbook legislation, expressly overruled the reasoning of Judd to the effect that State action which, even though primarily for the benefit of the pupil, has the effect of giving a constitutional benefit to sectarian schools, contravenes Article XI, section 3. Judge Scileppi, writing for the majority, expressed the Court's broader view of Article XI, section 3 in these words:

"The New York State Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here. As we said, although in a different context: 'It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and so broad as to impair both State and church, as we have come to know them.' ...The architecture reflected in Judd would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such. ... Since there is no intention (in New York Textbook Law) to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly."

The validity under Article XI, section 3 of a program of dual enrollment or shared time intended and designed to benefit the student, and assisting parochial schools only as a collateral effect, would undoubtedly be examined in light of the broad language of East Greenbush.

With respect to the Federal constitutional question, it seems likely that a dual enrollment program which could withstand the strictures of Article XI, section 3 would be found not to violate either the "establishment" or the "free exercise" clause of the First Amendment.

It should be pointed out that existing constitutional tax and debt limits might well make it impossible for many city school districts to undertake dual enrollment programs, even if authorized to do so by constitutionally valid legislation, and that repeal or revision of those limits would therefore be essential to full implementation of the dual enrollment concept.

TUITION PAYMENTS

It has been suggested that State subsidies be provided to parents to apply against tuition charges in nonpublic schools. This would be an extension into elementary and secondary levels of the Scholar Incentive Plan presently operating at the college level in New York State.

Relevant Considerations

Administration would be a major problem. The Scholar Incentive Plan presently for colleges embraces 208,000 students. If such subsidies were extended to the approximately 875,000 children who attend nonpublic elementary and secondary schools, the total number of such tuition payments would be approximately 1,083,000.

In order to understand the administrative problems involved, it might be well to review the procedures under which the present college scholar incentive tuition payments are made. Each student submits an application, including a statement of family income. The State Education Department then determines the amount of the tuition payment to which he will be entitled, based upon his family income, and issues him an award certificate. He presents this to the college he will be attending and the college then reduces his tuition charge by the amount of his entitlement. The Education Department sends to the college a list of the students who have indicated they will enroll therein and the amount of their individual entitlements. The college certifies that each student is in attendance and in good academic standing. The Education Department then notifies the Office of the Comptroller who authorizes the State Treasurer to issue a check to the individual student. This is then sent to the Education Department for forwarding to the college. The college then endorses the check under the power of attorney which it has previously secured from the student. The check, together with those of other students enrolled, is deposited in the college's general fund. If the student has already paid his tuition in full, the college transmits the check to the individual student for his own use.

The steps in the processing require several months after the beginning of the school year.

If such tuition payments were to be extended to children attending non-public elementary and secondary schools, the number of tuition awards would be multiplied by about five. This would, of course, substantially increase the administrative task.

As to the cost involved, this would depend upon the amount of such scholarships. If they were to average \$200 each, which is approximately the average of present college awards, the total cost would be about \$175,000,000.

The Scholar Incentive Aid Program presently applying to college students has not been challenged as to constitutionality. If a similar program were to be extended to elementary and secondary levels with consequent increase in public expenditure, it is possible that the principles on which all such aid is based would be challenged.

Legal Aspects

A definitive legal analysis of the tuition subsidy concept could be undertaken only on the basis of a thoroughly developed plan and is therefore beyond the scope of this paper. However, some observations may be made.

The United States Supreme Court has as yet neither approved nor disapproved of tuition grants to reimburse parents for the expense of providing their children's secular education at a church-affiliated school. Lower Federal courts have sustained such grants provided they do not tend to perpetuate racial segregation. Two State courts have barred--and there seems to be no question but that the Federal courts would do the same--tuition payments for church school pupils where the payments apply to all instruction, both secular and religious. No court has invalidated a statutory provision for tuition grants for specified secular subjects, such as U. S. history, English, foreign languages, mathematics, science and physical education.

It therefore appears not unlikely that a tuition subsidy plan which clearly limited State assistance to the cost of secular instruction in the nonpublic schools could meet the test of the First Amendment.

However, whether such a plan, constituting as it would a substantial--although indirect--form of aid to nonpublic schools would be found valid under Article XI, section 3 is most difficult to predict. The determination might well rest on the conclusion of the Court as to whether the intention and effect of such a plan is to assist children attending nonpublic schools or to assist the schools themselves.

Direct State Aid to Nonpublic Schools

If the State were to pay subsidies directly to nonpublic schools, the cost would depend upon the specifics of the arrangement. No cost estimate can therefore be made.

Apart from the legal questions, decisions would have to be reached as to whether such aid would be on an equal allowance per pupil or varied according to the financial resources of the schools. Since nonpublic schools do not have power to levy taxes, the resources available would presumably involve such factors as endowments, present assets, economic level of parents, etc.

Legal Aspects

Direct financial aid to sectarian institutions, regardless of limitations on the use of such aid, is clearly unpermissible under Article XI, section 3.

If the State constitutional provisions were repealed, such aid, if clearly limited to secular purposes, might well be held not to violate the provisions of the First Amendment.

CHAPTER V

QUESTIONS AND ISSUES

Beyond the questions already posed, providing public support for nonpublic schools would involve other fundamental issues of policy.

Examples of additional questions raised for the schools themselves may be cited:

If public financial support were to be provided in any form, would nonpublic schools accept the requirements now applying to public schools?

Adopt prescribed accounting and reporting methods?

Make records available for public inspection?

Submit to periodic audits?

Accept standards of educational practices for teacher qualifications, facilities, etc.

Adopt policies in public meetings?

For schools organized to perpetuate and strengthen a sectarian culture, would increase reliance on secular textbooks and secular teachers tend to weaken their thrust toward the very purpose for which they were organized? If public aid were to be provided nonpublic schools on the premise that they serve a public purpose, does it follow that they would then be required to discontinue considering religion, race, sex or ethnic background in their acceptance of students?

For the general public there are fundamental questions also:

In a nation of great diversity resulting from various racial and nationality backgrounds, the public school system attended by all has been thought to be a very important unifying influence. Would this be weakened if there should be a proliferation of nonpublic schools as a result of financial support?

On the other hand, is pluralism in education a valuable force which should be encouraged?

As to economic considerations, would public financial resources be overburdened if nonpublic schools were to curtail or discontinue their operations and return their students to the public schools? Would it not be less expensive for the public to support the private schools?

On the other hand, if tax resources for education are destined to be limited in relation to mounting costs, the greatest efficiency must be sought. Would it not be highly inefficient to carry on much of education in small units so often characteristic of private schools? There has been a strong trend in public school organization to merge small districts into larger ones to attain educational and economic efficiency.

As to educational quality, is it wiser to concentrate resources and efforts in the improvement of public schools, or might the encouragement of good private schools promote a healthy competition for educational improvement? What assurances are there that private schools would be of high quality?

These questions serve to illustrate how perplexing and fundamental are the issues of public aid to nonpublic schools. They involve judgments on which citizens hold widely differing views. The reasoning underlying divergent viewpoints is articulated in two thought-provoking statements appended hereto; Father Neil G. McCluskey's article entitled "Child Support or Wall of Separation?" (Appendix H) and Philip Jacobsen's statement "The Nonsectarian Public Parochial School" (Appendix I).

CHAPTER VI

LEGISLATIVE DEVELOPMENTS IN OTHER STATES

Several states have recently enacted legislation affecting aid to nonpublic schools. Others have considered such legislation.

Information gleaned from various publications and telephone conversations with the respective State Education Departments, summarized below, is believed to reflect the situation in these states.

Enacted

Connecticut - Public Act No. 791, 1969

The Secretary of the State Board of Education is required to contract with any nonpublic school meeting minimum standards "to purchase secular educational services" and to pay:

1. 20% of the salary of teachers of secular subjects (base salary without retirement or other fringe benefits, but not to exceed public salary schedule).
2. Cost of textbooks for secular subjects up to \$10.00 per pupil in grades 1 through 8 and up to \$15.00 per pupil in grades 9 through 12.

If 1/3 of the pupils of a nonpublic school are educationally deprived the 20% figure rises to 50% and if 2/3 of the pupils are so deprived, to 60%.

Open enrollment is required as well as visitation and inspection by the state which must appoint a special staff to administer the act. The act authorizes any taxpayer to bring suit to challenge the constitutionality of the act which appropriates \$6,000,000 (there are 360 private schools in the state).

A court test has been instituted (Appendix J).

Ohio - (Revised Code Section 3317.06, Division (H); 1967; First Funds 1968)

The state pays to school districts amounts approved by the state board for services and materials to pupils of nonpublic schools for:

1. Guidance, testing and counselling programs.
2. Programs for deaf, blind, emotionally disturbed, crippled and physically handicapped children.

3. Audio visual education.
4. Special and hearing services.
5. Remedial reading programs.
6. Educational television service.
7. Programs for improvement of educational and cultural status of disadvantaged pupils.
8. "Programs of nonreligious instruction other than basic classroom instruction."

The state is to adopt guidelines and procedures. First distribution of funds was in 1968, not to exceed specific appropriations.

Guidelines for supplemental salary allocation to lay teachers in nonpublic schools have been developed.

Pennsylvania - (Title 24, Pennsylvania Statutes, Chapter 23, Sections 5601 - 5609)

Sections 5605 and 5606 create the "Nonpublic Elementary and Secondary Education Fund," to consist of proceeds from horse racing (up to the first ten million dollars received from that source and, in addition, one half of the excess over ten million dollars so received). Until these funds come in annually, three-fourths of the proceeds from harness racing to the extent not required for certain other purposes are assigned to this fund until the fund reaches ten million dollars.

The chapter authorizes the superintendent of public instruction to make contracts with nonpublic schools for the purpose of "purchasing" secular educational services which are limited to mathematics, modern foreign languages, physical science and physical education. Only textbooks and other instructional materials approved by the state superintendent may be used, a satisfactory level of pupil performance in standardized tests approved by the state superintendent must have been attained and certification of teachers will be required after five years (from 1968).

The nonpublic schools must maintain special accounting procedures including maintenance of separate funds and accounts. Such accounts are subject to audit by the Auditor General of the State. Reimbursement may not exceed the total amount actually paid into the nonpublic elementary and secondary education fund in that fiscal year.

A court test has been instituted. (Appendix K)

Several shared service programs exist but most are centered in the western part of the state in the Allegheny County area. The law providing for state aid for specialized courses has been in existence since 1910. There has been very little actual change in enrollment or services provided since 1965. Four schools in Allegheny County, (all newly constructed buildings whose funds came from the Appalachia Act), Forbes Trail at Monroeville, Steel Valley at West Mifflin, Parkway West and A. W. Beattie Area Vocational School serve an estimated 75-100 nonpublic students.

Rhode Island appropriated \$375,000 for part payment of teachers' salaries in grades 1 through 8. The bill provides for underwriting 15% of salaries of those teaching secular subjects and who receive a wage of \$4,000 a year but not more than the maximum in the public schools.

A nonpublic school is defined as one which is not operated for profit and which does not expend more per pupil than at the average public school.

The Act also provides for the method of determining the amount of the supplement regulation by the Commissioner of Education and an appropriation of \$375,000. The Act took effect on July 1, 1969.

Legislation Considered in Various States

Illinois - Amended House Bill 1116

An act which adds to the school code in relation to the establishment, operation and maintenance of public schools, providing for transportation and scholarship for students in institutions of higher learning and the purchase of services for pupils in all schools. It provides for annual tuition grants to Illinois resident students at approved nonpublic elementary and secondary schools. Also, it establishes standards for schools to obtain such approval, provides a grant of \$60 for each elementary student and \$90 for each secondary school student. A contract procedure is established for paying and receiving such grants. Appropriates \$32,000,000 annually for the purchase of services provided and administration thereof.

Dual enrollment programs are regarded as permissible under present law. One such arrangement was begun at Elk Grove in 1965. Contributing factors were the following: junior high schools across the street from each other, parochial schools needed help, young population (average 28 years old), no other private schools in the community, and the community was 65% Catholic.

Only 200 children participated, 100 in each of two sessions. The state approved the counting of students one half time ADA. Parental choice was the main criterion for participation. Once the private students came to the public school, they became part and parcel of the public school operation (could not wear uniforms).

Curriculum: coursework for private students mostly Mathematics, Science, Physical Education. All youngsters were provided with psychological and speech services. This was never challenged because the community knew that all the students would be coming to the public high school ultimately. Youngsters were mixed together for grouping according to ability. No exchange of textbooks was necessary. Test results were fed back to private school authorities.

No local tax rate was necessary because of the program.

An ambitious dual enrollment program was carried out in Chicago. A report thereon is included herewith as stated previously in Appendix G.

Michigan - House Bill No. 2424 (defeated)

No specific sum is appropriated for the aid payable under this bill but the sum of \$1,200,000 is appropriated in the bill for the school year 1969-70 for the administration of the act.

The bill proposes an appropriation for each intermediate school district for 1969-70 and for each year thereafter which sum is determined by multiplying the number of nonpublic pupils residing in a school district by an allowance equal to $\frac{1}{2}$ of full time ADA payments. The total is not to exceed the sum of average net full time attendance multiplied by the total nonpublic attendance, but not more than 20% of total public school attendance.

Special provision is made for nonpublic schools within the inner city and within target areas designated by the State Board of Education as containing a substantial number of children suffering economic, educational, and cultural deprivation. For these pupils the act appropriates a sum multiplying the number of such children by a "scholarship" equal to the average of the net attendance allowance for the public schools. This inner city aid is not, however, cumulative with the basic allowance set forth above.

From this money the school district "purchases educational services" comparable to those offered in the public schools provided the nonpublic school is nonprofit, meets minimum standards and has open enrollment under the Civil Rights Act.

Services purchased include:

1. Professional teacher services (certification required), and with subject matter "comparable" to what is taught in the public schools.
2. Library and audio visual personnel services (if the person involved could serve in the public schools for comparable subjects.)
3. Educational counselling services.
4. Purchase of "educational components, materials and services designed to increase learning capacity and educational programs, materials and services, designed to increase performance of teachers and pupils."

Payment is made directly to the persons providing the service involved. For personal services payment must be made at least bi-weekly up to 90% of cost but may not exceed the average payment to the public schools. The State supervises testing of performance and is required to audit both the school district and the nonpublic school involved.

No money under this bill may be spent for religion or where the teaching "primarily inculcates religious tenets or doctrines."

Shared service programs have existed for some years. Those schools cited in 1964-65 by NEA and HEW were unique at that time. Cheboygan's is the oldest program and it still exists, but there are now larger ones. The most outstanding is in Centerline, Michigan which has an actual contract to provide basic education as well as special education to parochial students. Public enrollment is 6,000 nonpublic about 1,000. Fitzgerald (in the same area) is setting up a similar program. Saginaw Township is also developing a program.

There has been no legal challenge so far. An Education Reform Session is to begin this month (October, 1969) to consider the plight of the parochial school and talk is of a \$30-\$50 million package for lay teachers in parochial schools. The Governor is expected to present a bill for this within the next two weeks.

Missouri - (Senate Bill No. 375)

Legislation calls for the provision of reimbursement payments to parents and guardians who pay tuition for education of children in Missouri private schools. \$50 each semester for each student grades 1-8; \$100 each semester for each student grades 9-12. Amount to be doubled if parents effective income is \$3,000 or less. Allows also for establishment of the "Educational Aids - Private Schools - Pupils Fund." Based upon an estimated enrollment in private schools of 125,790 elementary and 37,963 secondary students, with 15% of the parents having incomes under \$3,000, first year cost would be \$23,197,300.

New Mexico - (House Bill 61) "Nonpublic School Student Tuition Grant Act"

Provides for grants of money by the State Treasurer to parents of residential students in nonpublic schools in New Mexico in specified amounts - \$100 for each school term for student attending grades 1-8 and \$200 for students attending 9-12, with an increase to \$125 for grades 1-8 and \$250 for grades 9-12 where parents effective income is \$2,000 or less per year.

The New Mexico Department of Justice finds no constitutional prohibition against a grant by the state for this purpose provided payment is made directly to parents and not nonpublic schools. Grants were not to exceed actual tuition payment nor be applied for tuition payments for religious instruction.

West Virginia - (House Bill No. 712)

A Bill was introduced in January, 1969 relating to state-aid to nonpublic schools. It provided for the county boards of education to have the power and duty to purchase from nonpublic schools secular education courses including mathematics, modern foreign language, physical science, geography, English, physical education and all other secular courses not involved or concerned with religious teaching or the morals or forms of worship of any sect. A credit for such purposes in computing state aid to counties will be granted under the state aid formula.

State Education Department estimates are that since 1965, dual enrollment programs in West Virginia have not changed substantially. St. Joseph's High School has enrolled pupils in Cabell County Schools in Huntington since 1930. The program has covered science in high school, art in junior high and other areas for both including guidance. Central High (Catholic) and Wheeling High School, Wheeling, West Virginia, are located across the street from one an-

other and have a very compatible, cooperative system. The best shared service program in the State is the one conducted between Lewis County High School and St. Patrick's School located in Weston, West Virginia. The County High School has a 1400 enrollment and St. Patrick's has 73 students in grades 9-12. Nearly all the St. Patrick's students share the high school services in some way.

A transportation problem is predicted which may affect these programs and which has limited their growth. The State Supreme Court has ruled that counties must provide transportation to nonpublic students and counties are refusing to do so. They have done so in the past only when it was convenient.

Montana -

Under present Montana Law (75-3501, RCM. 1947) textbooks are loaned to pupils attending public schools free of charge. The superintendent of public instruction is granted the power (75-3408, RCM. 1947) to provide transportation for students to nonpublic schools, who reside three (3) or more miles distant from said school; or to contract to the parent or guardian in lieu of furnishing transportation. The superintendent also has authority to reimburse parents or guardians for the cost of transportation. Proposed legislation confirms provision for both services referred to above; proposes the creation of a nonpublic elementary and secondary education fund and that the Superintendent of Public Instruction be authorized to enter into contracts with nonpublic schools for the purchases of instruction in secular subjects.

Vermont (Bennington)

The public school board of education, in an effort to enhance community solidarity, approved the provision of shared services in various subject areas for all 340 youngsters in the local Catholic high school. Areas were to include:

- a) All Industrial Arts and Vocational Shops
- b) Mechanical Drawing
- c) Homemaking
- d) Physics
- e) Biology
- f) Advanced Business
- g) Advanced placement and remedial instruction
- h) A modern foreign language other than French

The plan was never implemented, however, since the parochial high school closed suddenly, at the end of the school year. The resultant overcrowdedness necessitated adding a dozen relocatable classrooms to the new public high school, as well as the rental of the former Catholic school building.

Shared services are conducted at the elementary level presently. Parochial school youngsters are brought into the public (rented Catholic facility) building for physical education. An informal and mutually acceptable arrangement exists for shared services in instrumental music also.

According to the Attorney General of Vermont (September, 1969), "In our opinion, the proposed plan does not involve a public institution giving aid to a parochial school, but rather permits all children of the public to receive instruction in physical education without regard to their religious beliefs and without preventing them from receiving religious instruction outside the public school system. Accordingly, we are of the opinion that the plan suggested by the Bennington School District, Inc., is proper."

A further compilation of legal actions by various states, as published in State Government News, is included as Appendix L.

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APPENDIX A
NONPUBLIC SCHOOL ENROLLMENT BY AFFILIATION
FALL 1968

Religious Affiliation	Kgn. Half Day	Kgn. Full Day	1	2	3	4	5	6	7	8	9	10	11	12	Post Graduate	Un-Graded	TOTAL
STATE TOTAL	20,645	10,137	81,119	82,230	82,131	82,345	81,907	80,733	76,748	74,298	52,366	49,686	47,933	43,262	1,151	6,026	872,713
Roman Catholic																	
New York	4,204	974	19,846	19,827	19,906	19,812	19,548	19,295	18,336	17,484	13,408	12,511	12,030	11,459	243	38	208,922
Albany	2,643	60	3,750	3,821	3,884	3,831	3,739	3,749	3,541	3,561	2,820	2,797	2,620	2,515	2	35	43,366
Brooklyn	2,339	1,364	21,713	21,902	21,828	21,828	21,999	21,050	20,071	19,125	10,265	10,158	9,751	8,913		132	212,433
Buffalo	3,347	1,103	7,864	8,108	8,157	8,206	8,192	8,024	7,306	7,155	5,135	4,587	4,383	4,368	6	285	86,222
Ogdensburg	336		1,275	1,339	1,300	1,314	1,264	1,305	1,016	1,006	658	676	643	632	16	1	12,788
Rochester	1,465	153	4,254	4,519	4,526	4,596	4,691	4,717	4,362	4,305	2,772	2,603	2,362	2,427		217	47,966
Rockville Center	48	57	8,216	9,169	9,311	9,497	9,431	9,456	8,747	8,779	4,839	4,572	4,366	2,300		9	88,799
Syracuse	1,360	506	3,432	3,435	3,420	3,381	3,498	3,457	3,285	3,226	2,593	2,424	2,250	1,968			38,223
Nonaffiliation	70	27	107	100	97	96	98	99	117	126	675	587	599	525	4	102	3,422
TOTAL Roman Catholic	15,812	4,244	70,457	72,220	72,429	72,561	72,460	71,152	66,781	64,767	43,165	40,915	39,004	35,107	271	819	742,166
Jewish																	
Conservative	104	162	251	192	182	185	149	115	111	105	36						1,599
Orthodox	564	2,998	3,645	3,575	3,659	3,560	3,591	3,479	3,397	3,256	1,951	1,657	1,575	1,263	541	747	39,451
Nonaffiliation	127	454	514	466	465	433	347	352	278	223	1,635	1,578	1,611	1,465	124	145	10,211
TOTAL Jewish	795	3,614	4,410	4,233	4,306	4,178	4,087	3,946	3,786	3,584	3,622	3,235	3,186	2,728	665	892	51,266
Other																	
Other																	
Atlantic District	737	77	906	853	824	821	813	797	676	620	345	333	295	292	1		8,399
Eastern District	143		171	153	153	144	142	136	134	116							1,299
Nonaffiliation	21		30	43	47	48	50	61	56	34						21	41
TOTAL Lutheran	901	77	1,107	1,049	1,024	1,013	1,005	994	866	770	345	333	295	292	1	21	10,099

APPENDIX A

(Concluded)

Religious Affiliation	Kgn. Half Day	Kgn. Full Day	1	2	3	4	5	6	7	8	9	10	11	12	Post Grad- uate	Un- Graded	TOTAL
Day Adventist																	
Atlantic Union			57	48	50	51	70	66	58	64	42	42	35	24			143
New York Conference											67	63	60	44	1	2	701
North Eastern Conference	15		121	115	114	135	119	110	118	91							938
Greater New York Conference			32	31	33	51	51	57	65	57	52	48	35	22		1	535
7th Adventist		15	210	194	197	237	240	233	241	212	161	153	130	90	1	3	2,317
Episcopal																	
Dioocese of New York	291	68	268	269	241	214	231	206	239	198	209	214	216	170	3	70	3,107
Dioocese of Long Island	116	280	403	325	258	258	214	210	202	163	117	102	115	104		13	2,880
Unaffiliated	9	15	27	16	25	25	28	19	40	41	73	93	120	109		7	647
Episcopal	416	363	698	610	524	497	473	435	481	402	399	409	451	383	3	90	6,634
Society of Friends	115	45	110	109	108	90	96	111	173	170	225	206	206	164			1,928
Unitarian			3		3	4	6	6	5	7	6						40
Evangelical Orthodox	132	117	305	239	217	212	171	142	122	100	22	17	13	14			1,823
Evangelical Orthodox									1	4	12	11	10	5			43
Methodist				2	3	1	2	3	1	1	3			5		20	41
Evangelical		2	25	25	23	22	23	22	1	1						22	166
Evangelical	2,474	1,660	3,794	3,549	3,297	3,530	3,344	3,689	4,290	4,280	4,406	4,407	4,638	4,474	210	4,159	56,201

APPENDIX B
NONPUBLIC SCHOOL ENROLLMENT BY COUNTY
FALL 1968

COUNTIES	Ken. Half Day	Ken. Full Day	GRADES												Special	TOTAL
			1	2	3	4	5	6	7	8	9	10	11	12	P. G.	
STATE TOTALS	20,645	10,137	81,119	82,230	82,131	82,345	81,907	80,733	76,748	74,298	52,366	49,686	47,933	43,262	1,151	872,717
Adams	1,124	49	1,658	1,763	1,862	1,724	1,684	1,716	1,818	1,762	1,416	1,342	1,264	1,193	1	20,471
Allegany			27	32	31	26	25	26	14	10	13	11	22	26	3	267
Barre	328		604	630	659	635	651	627	530	509	428	368	350	339		6,718
Berks	118	47	278	239	254	257	281	249	235	195	123	106	129	112	1	2,624
Butler	55		238	260	257	304	326	313	324	313	242	241	237	209	1	3,320
Chautauqua	141	55	263	294	300	304	290	323	226	251	144	103	100	109	1	2,938
Chemung	47		214	221	261	275	273	291	280	239	149	147	139	152	35	2,688
Clinton	28		45	32	41	45	41	37	35	27	24					355
Columbia	125		409	410	356	362	345	371	307	302	221	238	213	203	4	3,866
Concord	41		31	54	31	50	47	46	58	61	61	74	108	99		809
Franklin	56	37	98	80	93	85	101	91	75	79	60	41	37	31	48	964
Greene																
Hamilton	160	21	785	775	820	760	765	729	646	610	476	541	569	495	38	8,275
Jefferson	2,885	980	6,636	6,727	6,827	6,803	6,809	6,670	6,242	6,129	4,715	4,208	3,970	3,924	9	73,903
Madison	20		65	101	101	97	102	123	105	109	32	36	48	45	7	1,040
Montgomery	109		232	210	208	218	207	196	128	130	106	113	134	102	8	2,101
Oriskany	44		58	58	67	78	65	75	80	85	59	52	44	57	1	830
Saratoga	77	6	153	150	143	149	157	154	150	161	181	146	126	136	19	1,908
Schoharie			36	42	49	34	44	47	40	39	61	63	55	62	60	632
Schoenher	74		128	153	148	162	138	140	112	112	29	34	35	36		1,301
Schoenher	101		212	219	226	227	226	245	207	211	159	157	133	172	1	2,496
Schoenher	30		60	70	48	60	45	55	32	24						424
Schoenher	195		208	218	203	205	186	184	76	53						1,554
Schoenher	34		41	40	35	38	49	36	40	39					26	352
Schoenher	978	266	3,236	3,419	3,355	3,414	3,431	3,461	3,309	3,288	2,336	2,201	2,027	2,088	558	37,367
Schoenher	59		105	90	101	130	115	120	118	151	131	136	131	120		1,507
Schoenher	663	368	6,260	6,997	7,124	7,326	7,337	7,352	6,873	6,986	3,170	2,955	2,869	1,767	7	68,623
Schoenher	7,721	6,903	42,885	42,580	42,128	41,766	41,614	40,651	39,585	37,453	27,055	25,875	25,507	23,707	802	448,778
Schoenher	316	64	653	736	718	766	782	752	684	700	546	561	571	539	1	8,395

(Concluded)

COUNTIES	Kno. Half Day	Kno. Full Day	GRADES														
			1	2	3	4	5	6	7	8	9	10	11	12	P. G.	Special	TOTAL
Alameda	277	193	823	801	774	775	808	803	786	745	591	631	591	576		22	9,196
Alameda	720	276	1,771	1,805	1,769	1,754	1,797	1,782	1,746	1,724	1,479	1,344	1,250	1,117		5	20,339
Alameda	169	4	192	228	210	214	212	194	187	177	113	114	69	99		8	2,190
Alameda	160		671	720	697	768	752	740	654	658	517	486	472	427	4	583	8,309
Alameda	16	6	70	78	75	67	64	78	36	38							528
Alameda	84		188	174	170	371	229	257	210	241	174	129	126	81		140	2,574
Alameda	50		73	73	65	63	73	66	71	69	45					58	706
Alameda	17	6	217	215	235	228	225	236	228	208							1,815
Alameda	501	65	793	741	762	762	751	740	705	705	855	899	867	832		14	9,992
Alameda	122	225	906	895	949	998	952	892	820	791	462	503	407	345	76	21	9,364
Alameda	46		384	421	432	433	421	419	332	320	175	168	163	155	4		3,873
Alameda	254		339	317	277	300	293	285	250	264	79	103	92	92	1	1	2,947
Alameda	423		507	503	511	502	499	482	406	404	341	333	284	327	1	35	5,558
Alameda											55	43	33	19			150
Alameda	38		85	72	88	70	82	84	53	66							638
Alameda	62	2	187	182	182	191	195	187	169	172							1,529
Alameda	296	101	2,953	3,123	3,062	3,104	3,014	3,033	2,706	2,686	2,375	2,217	2,106	1,086		90	31,952
Alameda	8		73	118	109	93	94	100	84	82	35	40	39	51	100	20	1,046
Alameda			45	51	50	42	38	56	66	2	1						285
Alameda			30	36	64	60	67	66	48	39		12	25	28	14		489
Alameda	7	53	397	347	429	393	424	415	356	358	138	122	85	55		289	3,868
Alameda	106		121	117	118	107	117	119	102	114	119	132	149	113			1,534
Alameda	75		70	75	73	75	88	79	67	69	3	3					677
Alameda	73		119	117	116	107	113	115	102	101							963
Alameda	1,597	394	4,357	4,268	4,360	4,436	4,334	4,293	4,201	4,131	2,859	2,640	2,324	2,105	92	117	46,508
Alameda	15	16	108	128	109	113	100	99	71	70							829
Alameda			22	25	19	19	29	33	29	36	13	18	33	31	7		314

STATEMENT OF

REV. PATRICK E. SHANAHAN, PRESIDENT

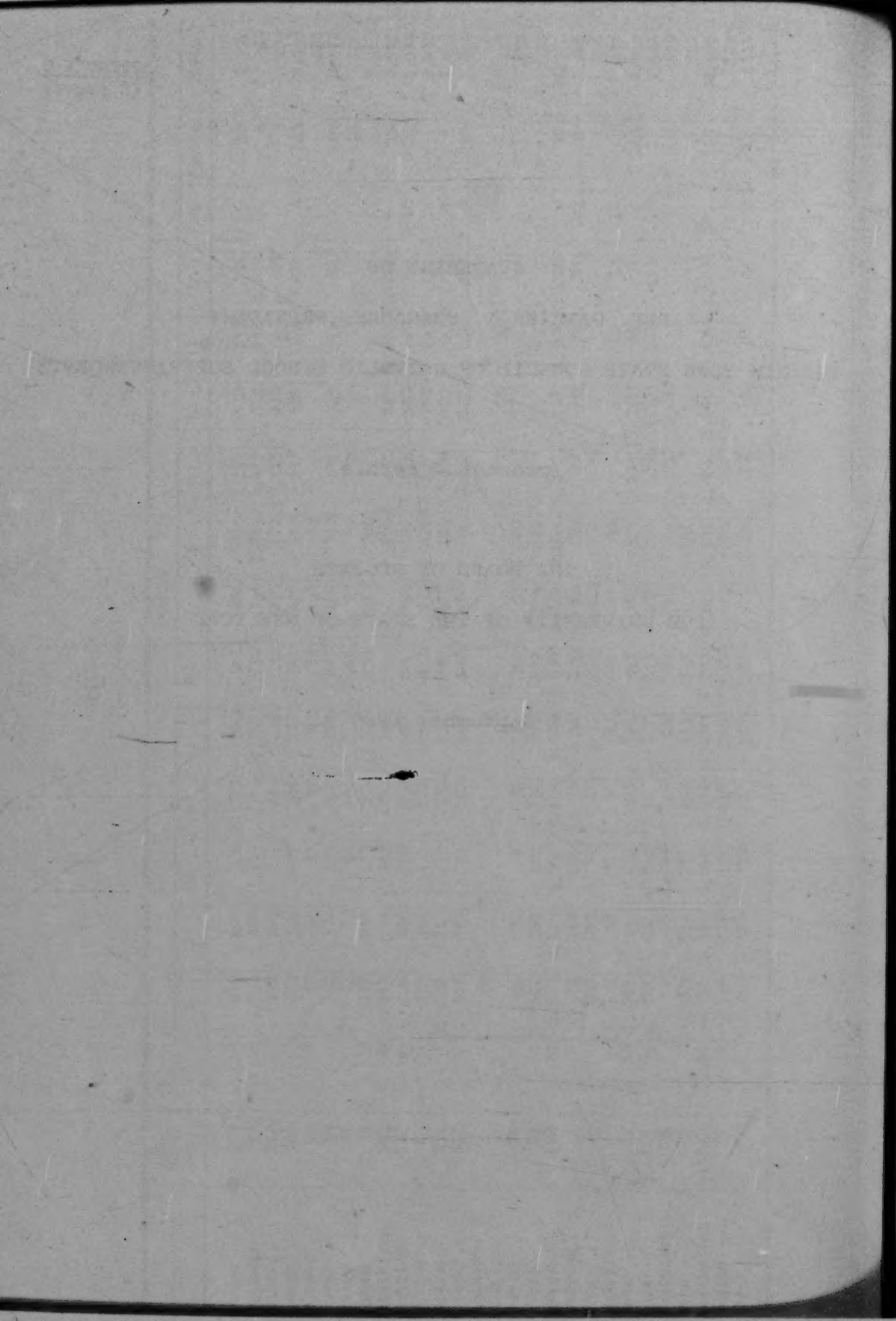
THE NEW YORK STATE COUNCIL OF CATHOLIC SCHOOL SUPERINTENDENTS

presented before

THE BOARD OF REGENTS

THE UNIVERSITY OF THE STATE OF NEW YORK

5 September 1969



My name is Patrick Shanahan. I am Superintendent of Catholic schools in the Diocese of Rockville Centre on Long Island. I appear, however, as President of the New York State Council of Catholic School Superintendents.

First of all, I wish to express the appreciation of our Council for this opportunity to address the Board of Regents. These crucial times make your responsibility for the education of all children in New York State a most weighty one. I would stress all children. For the problems facing education affect all schools, public and private, and any partial solutions would fail to meet the pressing needs.

Though grateful for this occasion to speak, I do so with some reluctance lest our efforts again prove fruitless. I must, therefore, express my disappointment and that of the other Catholic School Superintendents with your legislative recommendations for this past year. Last September at your first such hearing Monsignor Costello, Superintendent for the Diocese of Syracuse and then Council President, testified before you about the grave problems for which we felt we shared with you common interest and intent. You can imagine our surprise when your recommendations were published in December without a single reference to the educational welfare of over three-quarters of a million pupils in non-public schools.

Perhaps we failed to stress sufficiently the gravity of the situation. Permit me to do so this year by stating simply that the needs and rights of children in non-public schools cannot again be completely ignored. Your efforts and leadership toward the improvement of education in this state must involve non-public education in a meaningful way. Any legislative action for the increase of funds for education must this year include the non-public school child.

Gentlemen, the words of concern expressed by our Council at this same hearing a year ago were not empty ones. As subsequently discovered, enrollments in Catholic elementary and secondary schools had declined last September some 26,150 from the previous June. You may or may not be aware that in this past June, 1969, some twenty-two Catholic schools announced their closing; we have not yet obtained an accurate estimate of the numerous others which have deliberately phased out certain grade levels. We project a total state-wide decline this year in excess of thirty thousand children, reaching perhaps as high as forty thousand. The ramifications of this trend, which has been accelerating for the past five years in its rate of decline, would be far-reaching and indeed tragic if substantial numbers of these institutions were forced to close.

The loss would mean, first of all a diminution of freedom. Our country is a land of freedom because its people can exercise many liberties. The more these liberties are fostered, the stronger will be our state and country. One of the most fundamental of these liberties is the freedom of parents to enroll their children in either a public or non-public school which meets the academic criteria established by civil authority. If this liberty were only a paper one because the non-existence of schools other than public voided the exercise of that freedom, then this state and our country would be that much weaker, that much less free. The experiences of other countries with monolithic school systems should give us pause for thought as to the future of our country at a very crucial time in its history. We hold that the uniqueness of church-related and independent schools make a special contribution to the moral fibre of our society, to the principles of pluralism and parental rights so essential to a healthy nation. To sit by and do nothing beyond a show of sympathy would be a disservice to parents and pupils, indeed to all citizens.

The loss of these schools, furthermore, would be a loss tremendous savings to the burdened taxpayers of New York State. Last year alone the parents of children in our schools saved this state some three-quarters of a billion dollars in operational costs alone. I would hesitate to hazard a guess at the capital expenditures to house them in a period of sky-rocketing construction costs.

Yet I doubt if two billion would be far off, at least at this year's prices. And may I call to your attention that this savings in such vast amounts has been going on for years. This voluntary investment in education has been an unacknowledged boon to this State; now not only are the dividends in danger, but the account may have to be closed.

A third consequence is the necessary effect of that loss of savings: vastly increased spending for public schools, which means of course, higher taxes. It is somewhat difficult to imagine what would happen if a substantial number of our schools were forced to close. It would be as if this state, already over-burdened by educational costs, was asked to assume enrollments exceeding the State of Kentucky, Washington, Iowa, Connecticut, or anyone of the thirty states whose public school pupils are far fewer than New York's non-public schools'.

On Long Island, for example, as you well know, the financial pinch has become so great that over forty public school budgets were defeated when first submitted to the voters. Some call it a tax revolt. What would happen if these same people were asked to assume the total burden of educating the 88,000 children in the Catholic schools of Nassau and Suffolk Counties? Or what would happen in New York City if the 212,000 in the Brooklyn Diocese and the 209,000 in the New York Archdiocesan schools had to go elsewhere

The influx of these children in any great number does not mean additional revenues from new homes and industries. The children are already there, and the tax dollars of their parents are already paid and spent for present costs, in which their sons and daughters are not included in any significant way.

But of even more tragic consequence than damage to our dollars would be the effect upon children and their education. For they are our first obligation, our primary concern. Let me ask this question: could the public school system easily absorb the students in the non-public schools without some deterioration in quality and standards? In some areas, quite probably. But in the great majority of areas where there are large non-public school populations, I believe the results would border on chaos.

If I may again refer to Long Island, what would happen in Hicksville if our three Catholic elementary schools had to be closed? Only two years ago we housed a public school of that district in a new diocesan high school for one year because the public school building had been condemned. To have to add the equivalent of three new schools to an already hard-pressed district would be disastrous. Or suppose we were forced to phase out just the 7th and 8th grades of our schools in the Sewanhaka Central High School system.

There, I understand, they have a high school built for 1000 students but housing some 1,500. What would 700 more children mean for staff, class sizes, curriculum, equipment, schedules, auxiliary services, library facilities - in a word, the entire educational effort of a sorely tried, but striving district?

Instances like this would be detailed from all over the state. I relate them not as a scare tactic, but as a reality to dramatize, if you will, the enormity of the problem, which you and we must face and resolve.

I should indicate here our sense of urgency. Some people might view the decline of non-public schools to an insignificant role in education as a means of strengthening the position of the public school. A slow transferral of pupils over the next five or six years could be accommodated, they would assert and, therefore would urge no assistance. In all frankness I should indicate that we do not have the luxury of time: our people are looking now for decisions on the future of Catholic schools; costs have already exceeded revenues and predicted costs are impossible; and future plans must build on today's commitments to our personnel and of our facilities. To permit our schools to wither away would be self-destructive of any type or degree of educational effort which we might necessarily have to undertake in lieu of our current endeavor

Basic among various contribution factors to the problems of education is financial need. Non-public schools suffer in the same fashion as the public schools with rising costs, the value of the dollar, and increased demands for services and programs, and, of course, higher salaries. Dependent, however, upon tuitions and voluntary contributions, their position is far less stable and far more subject to an individual's budget cuts along the line of least resistance. The worries of public schools are real, but short-lived in the confidence that the basic dollars will always be forthcoming by law.

We cannot say the same, and the financial pressures on the supporters of the non-public elementary and secondary schools need some alleviation. It is here that we need your help - in the state's own self-interest at least, if not more justly from the right of these children and their parents to assistance.

The Council requests your serious and immediate consideration of this problem as it affects non-public schools. We shall be happy to assist yourselves or the staff of your Department in any way in seeking a solution.

For immediate response we would suggest a crash study of the issue, leaving a study-in-depth to the Commission of the Agents and the Governor, yet to be activated. We would look to

initial solutions being developed before the next session of the legislature. To that end we will submit with this Statement some preliminary investigations of our own Council which we are continuing, especially in the area of school costs, on a state-wide basis.

I would go even further by asking that you give some thought to various possible programs as enacted in other states such as Pennsylvania, Ohio, Rhode Island, and Connecticut. I might also suggest consideration be given to programs already put forward within this state, such as financial aid to parents of elementary and secondary pupils similar to the scholar incentive program for higher education.

We know full well that no matter what program you consider or propose, there will be those who will raise a Church-State question. It is an issue that must be faced, but faced realistically. The Supreme Court of the United States, as well as our own New York State Court of Appeals, have provided principles and guide-lines in their decisions on the recent Allen Textbook Case. Other states with constitutional limitations similar to our Article XI, Section 3, the so-called Blaine Amendment, have been facing this issue head on in finding solutions. Your position of educational leadership in New York State, which has always been in the forefront of educational achievement, expects the same from you.

ANOTHER ASPECT
OF THE
FINANCIAL CRISIS IN EDUCATION

The Current Problem of Support
For the Education of
Catholic Elementary and Secondary School Children

New York State Council
of
Catholic School Superintendents

September 3, 1969

INTRODUCTION

This Report consists of two parts. The first reviews various facets of Catholic education at the elementary and secondary grade levels in New York State. Each in its own way has some bearing on the mounting financial problems of this sector of American education. The second part presents some remedies toward solving, or at least alleviating, this fiscal crisis which has implications for all of education.

Particular note should be taken of the responsibility of government in this situation. It must equitably assure the proper education of all children while preserving a viable exercise of the parental right of freedom of choice. It must also safeguard to the highest extent possible the financial benefit to the taxpayer which the supporters of Catholic education have voluntarily contributed for so many years by maintaining such a significant number of non-public schools. Economic foresight urges immediate and effective action by civic and government leaders.

We are releasing this report at this time in order that all concerned with the current financial problems of the public schools in this State may realize that those difficulties cannot be resolved without also responding to the needs of three-quarters of a million Catholic school children beset by the very same crisis.

New York State Council
of
Catholic School Superintendents

PART I

Section A: PUPILS

1. Enrollments

Presented immediately below is a chart of the total enrollments reported by the eight dioceses for the past five school years and the present one, 1968-69.

Catholic Elementary and Secondary Enrollments

<u>Dioceses</u>	<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>	<u>1967</u>	<u>1968</u>
Albany	50,024	49,605	48,209	46,263	45,024	42,845
Brooklyn	219,298	222,452	223,718	221,010	217,366	212,797
Buffalo	100,100	100,565	97,902	95,423	92,133	86,756
New York	221,021	222,328	221,615	220,026	215,627	209,210
Ogdensburg	16,390	16,262	15,635	14,667	13,891	12,833
Rochester	57,147	57,159	55,946	54,286	51,661	47,973
Rockville Centre	85,795	88,046	88,792	91,325	91,057	88,810
Syracuse	41,840	42,023	41,551	40,848	39,337	38,692
TOTALS	791,615	798,440	793,368	783,848	766,066	739,916
CHANGE						
Numerical -		+6,825	-5,072	-9,520	-17,782	-26,150
Percentage -		+0.86%	-0.63%	-1.19%	-2.26%	-3.41%

2. Major Conclusions

- (a) A trend of declining enrollments is developing.

Given the declining number of religious, rising costs, increasing salaries of both religious and lay personnel, continued reduction of class size by policy, consolidation of schools, no expansion of facilities, and projected school closings, the trend will undoubtedly continue.

- (b) Declining enrollments, distributed state-wide through more than 1,400 elementary and secondary Catholic schools, do not allow for substantial reduction of costs insofar as total school plants have to continue to operate.

- (c) Implications for public schools:

(i) that public schools will be absorbing our transfer pupils with a concomitant increase of costs for public education.

(ii) that non-public schools will not be absorbing any proportionate share of increasing school-age population as in the past; public schools will have to enroll these additional children as well.

(iii) that up till the 1966-67 school year the increasing enrollments of other non-public schools in New York State had offset the decline in ours; for the first time in 1967 the net total enrollments of all non-public elementary and secondary schools showed a decline, repeated again this year.

- (d) Research will have to be undertaken on the degree to which other factors may be contributing to this decline; e.g., parental attitudes, diversification of apostolates in religious communities, recognition of the role of Catholic schools by Church structures and personnel, etc.

PART I

Section B: TEACHERS

That the vast complex of Catholic schools became the inspiring reality it is must be credited in major measure to the dedication and service of thousands of religious men and women. The religious sister has been and is rightfully an honored symbol of the Catholic school.

Special tribute must also be rendered to religious communities as such; much is owed in the development of Catholic education to their initiative.

Recognition must also be given to the sacrifice of those lay teachers, who for decades have chosen this apostolate over the professional rewards of public school service.

The existence and growth of the Catholic schools has been predicated, therefore, on the low cost of personnel. For example, estimated per pupil costs in Catholic elementary schools for the current year, 1968-69, would average from \$150 to \$250. This low per pupil expenditure has been made possible by a high ratio of religious teachers, whose salaries range from \$1,200 to \$2,500, and by lay teacher salary schedules which are well below the public school scale.

The impossibility of a continued low cost-high return program is the more apparent when the following statistics are examined.

1. Decreasing Numbers of Available Religious Teachers

Presented immediately below are statistics for the past five years and the current school year showing the number of full-time religious and clerics staffing elementary and secondary schools in the eight dioceses of this State.

Clerical & Religious Full-Time Staffs

<u>Diocese</u>		<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>	<u>1967</u>	<u>1968</u>
Albany	Elem.	826	844	823	795	790	745
	Sec.	381	423	402	429	411	378
	Total	1,207	1,267	1,225	1,224	1,201	1,123
Brooklyn	Elem.	2,729	2,739	2,841	2,607	2,441	2,222
	Sec.	1,182	1,158	1,206	1,163	1,156	1,131
	Total	3,911	3,897	4,047	3,770	3,597	3,353
Buffalo	Elem.	1,387	1,387	1,358	1,337	1,314	1,246
	Sec.	638	632	640	629	624	587
	Total	2,025	2,019	1,998	1,966	1,938	1,833
New York	Elem.	2,743	3,021	2,967	2,908	2,785	2,583
	Sec.	1,586	1,569	1,625	1,599	1,602	1,605
	Total	4,329	4,590	4,592	4,507	4,387	4,188
Ogdensburg	Elem.	317	306	301	300	284	264
	Sec.	117	115	133	99	111	96
	Total	434	421	434	399	395	360
Rochester	Elem.	722	691	731	712	655	601
	Sec.	378	394	396	410	397	394
	Total	1,100	1,085	1,132	1,122	1,052	995
Rockville Centre	Elem.	1,093	1,114	1,169	1,126	1,128	1,016
	Sec.	281	308	314	403	465	516
	Total	1,374	1,422	1,483	1,529	1,593	1,532
Syracuse	Elem.	589	565	650	622	611	594
	Sec.	273	280	288	301	318	308
	Total	862	936	938	923	929	902
TOTALS	Elementary	10,406	10,758	10,845	10,407	10,008	9,271
	# Change		+352	+ 87	-438	-399	-737
	Secondary	4,836	4,879	5,004	5,033	5,084	5,015
	# Change		+ 43	+125	+ 29	+ 51	- 69
	TOTALS	15,242	15,637	15,849	15,440	15,092	14,286
Change #			+395	+212	-409	-348	-806
	%		+2.6%	+1.4%	-2.6%	-2.3%	-5.3%

2. Increasing Numbers of Lay Teachers

Correlated with the decreasing number of religious teachers, particularly Sisters, is the increased number of lay teachers. The increase has been necessary, despite substantially decreasing enrollments, because pupil losses have until now been spread (requiring the continued operation of classroom and plants) and because programs and courses have increased both in specialization and number.

Full-Time Elementary & Secondary Lay Teachers

Diocese		1963	1964	1965	1966	1967	1968
Albany	Elem.	210	214	215	230	289	291
	Sec.	47	71	69	84	96	111
	Total	257	285	284	314	385	402
Brooklyn	Elem.	1,002	1,081	1,245	1,363	1,550	1,799
	Sec.	492	458	568	661	687	709
	Total	1,494	1,629	1,813	2,024	2,237	2,508
Buffalo	Elem.	815	865	912	967	1,019	1,072
	Sec.	288	345	352	384	427	480
	Total	1,103	1,210	1,264	1,351	1,446	1,552
New York	Elem.	1,563	1,914	2,066	2,181	2,312	2,524
	Sec.	730	806	921	984	1,098	1,278
	Total	2,293	2,720	2,987	3,165	3,410	3,802
Schenectady	Elem.	68	79	84	79	90	101
	Sec.	22	26	25	24	28	31
	Total	90	105	109	103	118	132
Rochester	Elem.	451	516	545	592	634	697
	Sec.	124	135	149	155	165	169
	Total	575	651	694	747	799	866
Saratoga Springs	Elem.	595	639	794	868	909	998
	Sec.	117	132	141	174	233	358
	Total	712	771	935	1,042	1,142	1,356
Syracuse	Elem.	158	166	172	202	221	247
	Sec.	63	81	96	117	135	152
	Total	221	247	268	319	356	399
TOTALS	Elementary	4,862	5,474	6,033	6,482	7,024	7,729
	# Change		+612	+559	+449	+542	+705
	Secondary	1,883	2,144	2,321	2,583	2,869	3,288
TOTALS	#Change		+261	+177	+262	+286	+419
	TOTALS	6,745	7,618	8,354	9,065	9,899	11,017
	Change #		+873	+736	+711	+828	+1,124
TOTALS	%		+12.94%	+9.66%	+8.51%	+9.13%	+11.36%

3. Ratio of Religious and Lay

Relating the two previous trends, we note also that the religious-lay ratio of staffing is also changing at an increasing rate.

Lay Teachers as Percentages of Staffs

<u>Diocese</u>		<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>	<u>1967</u>	<u>1968</u>
Albany	Elem.	20.3%	20.2%	20.7%	22.4%	26.8%	28.1%
	Sec.	11.0	14.4	14.6	16.4	18.9	22.7
	Total	17.6	18.4	18.8	20.4	24.3	26.4
Brooklyn	Elem.	26.9	28.3	30.5	34.3	38.8	44.7
	Sec.	29.4	32.1	32.0	36.2	37.3	38.5
	Total	27.6	29.5	30.9	34.9	38.3	42.8
Buffalo	Elem.	37.0	38.4	40.2	42.0	43.7	46.2
	Sec.	31.1	35.3	35.5	37.9	40.6	45.0
	Total	35.3	37.5	38.7	37.7	42.7	45.8
New York	Elem.	36.3	38.8	41.0	42.9	45.4	49.4
	Sec.	31.5	33.9	36.2	38.1	40.7	44.3
	Total	34.6	37.2	39.4	41.3	43.7	47.6
Ogdensburg	Elem.	17.7	20.5	21.8	20.8	24.1	27.7
	Sec.	15.8	18.4	15.8	19.5	20.1	24.4
	Total	17.2	20.0	20.1	20.5	23.0	26.8
Rochester	Elem.	38.4	42.8	42.5	45.4	49.2	53.7
	Sec.	24.7	25.5	27.3	27.4	29.4	30.0
	Total	34.3	37.5	38.0	40.0	43.2	46.5
Rockville Centre	Elem.	35.2	36.5	40.4	43.5	44.6	49.5
	Sec.	29.4	30.0	31.0	30.2	33.4	41.0
	Total	34.1	35.2	38.7	40.5	41.8	47.0
Syracuse	Elem.	21.2	20.2	20.9	24.5	26.6	29.4
	Sec.	18.8	22.4	25.0	28.0	29.8	33.0
	Total	20.4	20.9	22.2	25.7	27.7	30.7
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TOTALS	Elementary	31.8%	33.7%	35.7%	38.4%	41.2%	45.5%
	Secondary	28.0%	30.5%	31.7%	33.9%	36.1%	39.6%
	TOTALS	30.7%	32.8%	34.5%	37.0%	39.6%	43.5%

4. Conclusions

1. A state-wide decrease of some 5.3% religious in the current school year against last year's 2.3% and the previous year's 2.6% indicates that a downward trend is developing in the number of religious staffing the schools.

This conclusion can also be verified by projected closings of some schools at the end of this school year because of withdrawal of personnel by religious communities and by reported probabilities of those leaving religious life. No evidence to the contrary is currently available which would indicate either increase or stabilization in the number of religious teachers for the foreseeable future.

2. The correlative increase in lay staffing follows conclusively from the prior point as well as from the apparent trend. Between the 1963 and 1968 school years religious staffing declined by some 956 teachers or 6.3% (from 15,242 to 14,286); in that same period lay teachers increased 4,272, up 63.3% (from 6,745 to 11,017).
3. At present rates, within one or two years the majority of staff members will be lay for state-wide totals and for several individual dioceses.
4. Since personnel costs are the major item in schools' operational budgets, costs will increase each year at a drastic rate. This will be caused not simply by the increase of lay teachers replacing religious, but also by increasing salary levels for both religious and lay. This increase is definitely foreseeable for a number of reasons: decline in the numbers of religious has impact on religious community income and substantial salary increases for religious teachers are now being sought; we will have to enter more into the general market of teachers and will, therefore, have to become more competitive in salary schedules; cost of living increases (4.7% in 1968 alone) will push salary needs higher; and the current turmoil in ranks of professional education (salary demands and strikes; collective bargaining, and growth of power of teacher organizations) are already or will soon be affecting Catholic schools.

PART I

Section C: PARENTS OF CATHOLIC SCHOOL PUPILS, CATHOLIC LAITY, AND GENERAL PUBLIC

1. Parents of Catholic School Pupils

The major question at the present time relative to parents appears to be their general attitude toward Catholic schools.

Instances of attempted school closings in some areas have resulted in parental protests, willingness to increase financial support, and acceptances of total staffing by lay teachers.

Consensus among the dioceses on this point indicates:

- (a) Parents, in general want Catholic schools to continue; their commitment to Catholic schools is still operative.

This conclusion has been verified by the limited research undertaken on parental attitude toward Catholic schools; e.g. the attitudinal survey undertaken in the Archdiocese of Indianapolis and the Dioceses of Evansville and Louisville by the Catholic Education Research Center at Boston College.

- (b) Parents are not significantly aware, in general, of the critically increasing problem of financial and personnel resources.
- (c) Until now, parents generally have not been involved in the decision-making process affecting the operation of the schools. Hence, they have not felt responsibility for seeking solutions for the schools' economic problems.
- (d) Reasons for parents withdrawing children are so varied that no common significant pattern of parental attitudes emerges. Major reductions in enrollments appear to be caused by increasing tuition costs, reduction in class sizes and mobility of population. No significant evidence is now available on the degree or extent to which other factors might be operative: attractiveness of public school "extras"; increase of lay teachers; loss of confidence in the future of Catholic schools; need for special services available in public schools; and lack of understanding of the "uniqueness" of Catholic schools.

2. Catholic Laity

The laity continue to contribute to the support of Catholic schools via their parish weekly donations.

This tacit approval in the continuance of a standard practice does not imply a positive attitude. Despite rising costs, contributions have continued at a stable rate; i.e., contributions tend to remain the same or vary only slightly despite significant changes upward in per capita income and downward in purchasing value of the dollar.

In general, this type of giving is relatively detached and unconcerned with the use of the funds.

Attempts to induce greater support from the laity have not significantly raised the level of support. This is understandably in the light of continually rising taxes and costs of living.

3. General Public

Both the consensus of the Council members and a survey of public opinion on Catholic schools conducted in New York State verify that the general attitudes of the public toward Catholic schools may be described as follows:

- (a) Non-Catholics do not feel very familiar with Catholic schools. They lack an understanding of Catholic schools as truly educational institutions, seeing them rather as doing a good job of instilling spiritual values, satisfying parents on religious education, and providing effective discipline.
- (b) Those who tend toward strong opposition to Catholic schools are a relatively small minority and do so by associating or transferring their feelings toward the Catholic Church to the schools.
- (c) The general public is quite vague in its concept of the proportionate size of non-public education in New York State. People tend, therefore, to be significantly unaware of the economic importance of non-public schools for educational cost savings to the taxpayer.
- (d) A vast majority of the public endorses the basic principle of having religiously affiliated schools along with public schools. They recognize the essential need of pluralism and the right of an operable freedom of choice in education.
- (e) A significant portion of the general public would be in favor of some type of state aid to non-public school pupils. Given better knowledge of these schools, of the extent of their current fiscal crisis and the impact on parents, and of the economic implications in their decline for the costs of public education, the ratio in favor of assistance would increase substantially.

The public image of our schools and the public's understanding of them and their significance still needs clarification and improvement.

PART I

Section D: CHURCH STRUCTURES

1. Diocese

Statements by the Bishops both nationally and within the State have reaffirmed their belief and support of Catholic schools as a legitimate and effective apostolate of the Church in the temporal and spiritual concerns of this era.

In general, therefore, the Bishops of the State:

- (a) Are committed to Catholic schools at the elementary and secondary levels.
- (b) Endorse the need for research and experimentation in order to make such schools more effective educationally.

- (c) Endorse the need for coordination of efforts in the total field of religious education.
- (d) Are studying changes in administrative structures, consonant with their own responsibilities, which would contribute to the resolution of some of the difficulties currently facing the schools and the dioceses.

2. Parishes

General observations on present relationships of schools to the parishes:

- (a) The parish elementary schools each year are using up a proportionately greater share of ordinary parish income, which is remaining stable while school costs increase.
- (b) There is need for more information on the actual cost of Catholic school operation. Present estimates vary widely depending on the cost factors considered.
- (c) Pastors are finding it more difficult to recruit and retain religious teachers for staffing schools.
- (d) Teachers' salaries are a source of increasing concern.
- (e) New parishes are not opening schools or are doing so with reluctance because of the prospect of enormous costs.

General Conclusion:

The relationship of school to parish calls for redefinition, both to strengthen the school's role in contributing to the effective operation of the total parish and to reaffirm the image of the school as an effective instrument in promoting the moral and spiritual welfare of both the civic and parish community.

3. Religious Communities

- (a) Teaching sisters, brothers and priests in the majority (estimates run as high as 75%) are still committed to the educational apostolate, and to school work in particular.
- (b) Their level of professional ability and training is increasing through more selective admission-screening procedures and improved programs of preparation and religious formation.
- (c) Desirous of excellence in their school work, some are experiencing frustration and somewhat low morale, since they find the present system not conducive to such attainment. There is often a lack of opportunity to exercise professional responsibilities in accord with their training. Furthermore, financial pressures are curtailing the range of effective programs and services available to them in meeting the needs of individual children.

Section E: FINANCES

Contrary to some popular impressions, the financial operations of Catholic schools are not centrally controlled. Too often people view the church as some type of corporate operation similar to a General Motors or a U. S. Steel in its financial management; they then transfer that image to the schools as if they were systematized in the same fashion as those of a public school district.

By way of background to this section, the following details on the financial aspects of Catholic elementary and secondary school operation should be understood.

- a. Catholic elementary schools and most secondary schools have traditionally been the financial responsibility of the local unit; i.e., of the parish or of the school itself.
- b. With this long-established practice of local financing and management, in past years it was not necessary to develop centralized procedures.
- c. The absence of a broad-scale collection of cost data made it difficult in recent years to forecast or assess directly the growth of the financial squeeze on school operations. Growing individual instances, however, is now developing cumulative evidence which spells general financial crisis in bold and unequivocal terms.
- d. Within the past two years three dioceses have initiated uniform reporting procedures on school operations, and the others are instituting or preparing for such at the present moment.
- e. Some dioceses have already initiated studies on the school costs data that are available to them. One, the Archdiocese of New York, has undertaken this on a major scale as part of its research for its blue-ribbon Committee on Education.
- f. Some dioceses sponsor diocesan high schools. Administered as a system, these do allow for coordinated fiscal analysis. Charging tuition, they are financed by additional subsidies of assessments against parish units or by special appeals for additional funds to meet operational deficits. Capital expenditures and debt service are also covered by the latter two methods and by special fund-raising drives. In all of these methods, the burden of system costs is shared by all the laity, again at the local level.

In summary, therefore, two points must necessarily be understood: (1) the de-centralized system of Catholic education does not make immediately available or easily retrievable complete, broad-scale data on our schools' financial operations at the present time, (2) with the custom of local control

and local financing, the schools, whether of the parish or of the diocese, are supported totally by the laity on a year-by-year basis through tuitions, weekly donations, special collections for assessments, and fund-raising campaigns. The current fiscal crisis, therefore, is essentially that of the laity and, more so, of the parents of children in Catholic schools.

1. Instances of Cumulative Evidence of Financial Crisis

- a. Where there is some degree of centralized fiscal management, as with diocesan secondary schools, reports indicate mounting deficits and net losses despite catapulting tuitions.
- (1) Though continually increasing secondary tuition rates from \$50 to a current level of \$600 (up 600%), the Diocese of Brooklyn had a \$1,700,000 deficit for 1967-68 and \$2,517,149 for 1968-69.
 - (2) For the high schools in the Diocese of Syracuse operating deficits rose from \$138,000 in 1964-65 to \$596,000 in 1968-69, over 400% in just five years.
 - (3) After five straight years of raising tuitions from \$90 to \$250 the Diocese of Buffalo will increase it again for 1969-70 to \$350 to ward off a predicted net loss (after all tuition and subsidies) of \$1,400,000 for its twenty-one high schools.
 - (4) The four large diocesan high schools of Rockville Centre had an estimated cash deficit of some \$897,000 for 1968-69. For the coming year tuitions will be increased from \$250 to \$300; presuming no decline in enrollments the deficit is expected at a minimum of \$600,000.
 - (5) For its twelve high schools with over 14,000 pupils the Archdiocese of New York incurred a 1968-69 deficit of some \$2,160,000.
- b. In local parish elementary schools and in private Catholic schools (those operated and financed by religious communities), the picture is the same.
- (1) In one parish operating a school for grades K through 12, cost increased from 1961 (828 pupils) to 1968-69 (595 pupils) by 149.8% (from \$57,177.18 to \$127,946.38). At the same time its total income went up in the same period only some 54.8%. The school will not open in September 1969.
 - (2) In all of the elementary parochial schools of the Diocese of Rochester lay teacher costs jumped 24% in one year with only a 7% increase in number between 1967-68 and 1968-69.
 - (3) A private high school in a relatively sound economic area experienced two successive years of losses of \$30,000 and the \$45,000. These were offset each time only by special activities.

and support by parents and friends. It is now operating on a year-to-year review to remain open or close; the school enrolls 575 pupils in grades 9-12.

- (4) The Committee on Education for the Archdiocese of New York reported that the elementary schools of the Archdiocese will be \$30 million in the red by 1972. Cash operating costs per pupil jumped from \$55 in 1958 to \$156 in 1968 and are projected to be somewhere between \$179-\$238 by 1970, between \$256-\$379 by 1972. These costs exclude contributed services, depreciation, and other non-cash costs. Including the latter, the real per pupil costs for 1968 would be \$396.
- (5) An accounting firm's financial analysis of another private high school reveals four straight years of operating losses. Previously covered by cash reserves the school was finally forced to borrow \$30,000 to meet its 1967-68 loss and maintain operations in order to open for 1968-69. With a tuition increase from \$200 to \$300 in September 1968, enrollments declined from 666 to 578. Repayment of loan, increased costs, and drop in projected possible revenues has resulted in another net loss and forced the school to obtain another bank loan, this time higher, to complete its school year. Its officials are now reviewing its continuance of operations, though only thirteen years of existence.

2. Conclusions

- a. Just as vulnerable to rising costs and inflationary effects on income purchasing power, Catholic schools are experiencing financial difficulties similar to the public schools. Indeed, public school expenditures have a real relation to non-public education; the teacher wage spiral in public education has a direct effect on our own wage scales which attempt to maintain a just and reasonable proximity to theirs.
- b. Likewise affected by inflation and higher costs, the Catholic parent and laity are more than ever experiencing real difficulty in supporting both public schools through rising taxes and their own schools through tuitions and voluntary contributions. Declining enrollments after substantial tuition increases as well as the slowing down of any increase of contributions in recent years point to "the well going dry."
- c. Supported by tuition and voluntary contributions, the financial crisis of Catholic education is much more serious and far-reaching in its possible effects than the public schools' whose existence and income are legally maintained and reinforced.
- d. Continued operation of the schools anywhere near present levels of enrollments and staffing will prove economically impossible for parents and laity within one to two years without government financial aid.

- e. Discontinuance of Catholic schools on any major scale will compound public school financial problems by greatly increased costs. For the necessary additional income, taxes will have to be raised drastically.

PART II

RESPONSE TO THE FISCAL CRISIS

Of major and immediate importance is the present fiscal crisis of Catholic elementary and secondary education. Its immediacy of need is reinforced by the fact that delay would only aggravate the problem and make any solution that much more difficult and costly.

The present situation warrants, indeed requires, that the total method of financing education for children in Catholic schools be re-designed. Three major approaches should be taken.

1. Internal Procedures

- (a) We recommend that our schools and their respective dioceses institute as soon as possible a state-wide uniform accounting system toward more effective use of the financial resources already available to the schools. We urge the institution of such procedures in order that a more accurate picture may be obtained of the fiscal state of the schools.

We urge that all schools be required to prepare an annual budget and a three-year projection of costs and income. We suggest centralized purchasing procedures in those dioceses where this practice has not been instituted and, according to circumstances within individual dioceses, centralized financing so that the total available resources for education in a diocese may equitably serve the total needs of all children.

- (b) Without projecting ourselves into the much larger field of the total financial concerns of the Church in all its various activities, we feel strongly that we must establish in the minds of our Catholic people and the general public the credibility of two points: the actuality of our financial need in education and the inadequacy of our own financial resources to meet those needs.

The processes we have recommended above will go far in assisting to establish both these points.

We recommend that the principle of financial accountability in school operations be endorsed by parishes and dioceses. We believe that financial accountability will show that the financial needs of our schools are real, that the dioceses and individual parishes have extended themselves for education while carrying a variety of charitable and social welfare works.

2. Responsibility of the Laity

The history of the Catholic schools in this state stands as an irrefutable testament to the generosity and sacrifice of the Catholic people. Adults of this era attest time and again to the sacrifices made by their parents in days of less affluence to send their children to Catholic schools. We are certain that, were Catholic schools in America to cease tomorrow, the record of their phenomenal growth would have to be recorded as one of the most outstanding accomplishments in the history of education, be it of this state or of the nation.

But as our parents and their parents and the total laity responded to the needs of the schools and the Church in their times, the challenge, or rather the appeal, must now be presented to all the people of God in this day to respond to the needs of today.

Given the need for the continuation of our schools, two responsibilities must be assumed by the laity:

- (a) All of the laity must recognize that Catholic education in all its variant forms, including the elementary and secondary schools, requires their support. In unequivocal terms we now call upon them in this era not only to continue, but even to increase their financial support of Catholic education. And we say this in full knowledge of all the economic demands of our age. The Church and its schools are now in need of support and assistance; we turn to our laity, confident that they will respond if they are aware of the need.
- (b) Parents of children in our schools have a special obligation. They bear a responsibility for the education of their children; indeed they have the primary responsibility to see to it that their children receive an education which will fit them to develop their full potential for this world and the next.

In accord with this obligation we recommend that in each diocese a stated policy on tuition be instituted. We recognize that for many years the Church has felt that support of the schools was the responsibility of all Catholics, whether parents of school-age children or not. We do not deny the continued applicability of such a principle, but we urge that parents who may reasonably afford it participate more concretely in the fulfillment of their responsibility for the proper education of their children by paying tuition according to their means.

3. Governmental Support

With the knowledge of the extent to which the Catholic laity have extended themselves in support of both Catholic schools and public education and with the knowledge that even increased support from them will not adequately meet the needs of the schools, we believe that parents must now turn to the State and Federal governments for assistance. They can do so without hesitation and with full understanding of the limitations imposed by our principle of separation of Church and State. For they recognize, the contributions which our schools render to the social, economic, moral, and democratic life of our country.

Despite opinions to the contrary, research has established that Catholic education, rather than being divisive, contributes no less to the social well-being of communities than the public schools.

The significance of Catholic education to the economic well-being of New York State can be simply stated. Three-quarters of a million children in Catholic schools saved this State and its taxpayers approximately \$750,000,000 in operational expenditures this year alone. If we were to add a capital investment in additional facilities, school district indebtedness would have to be increased by substantially more than two billion dollars. If the present trend of declining enrollments in Catholic schools were hastened by a policy of closing schools, there would be disastrous consequences for hundreds of school districts.

Public school authorities are deeply concerned about the effectiveness of their institutions in the teaching of moral and spiritual values. This is not intended to demean the efforts of public school educators, for whom we have the highest respect for their dedication to the children of this State. Nor is it meant to imply that some public institutions are not extending themselves to educate their pupils to the moral obligations which the preservation of the blessings of this country requires of them. We do state that, given the current sense of values of society in general, given the wide range of problems facing public education in the moral sphere of rightful authority, reasonable freedom, personal and community health and safety, and social responsibilities, the need of present-day society for men and women educated theocentrically, committed to moral and spiritual values based upon a religiously-supported philosophy of life, is without parallel in our history.

The absence of our schools from the American education scene would leave us with a monolith where "freedom of choice" in a democratic society would be destroyed because the opportunity to exercise that right would be non-existent. Recognition should be given to the contribution of sound and effective non-public schools to principles long recognized as essential to our democratic way of life: pluralism, competition, and, above all, the freedom and rights of the individual.

We firmly believe that the preservation of good non-public schools, sectarian and secular, is in the best interests of our American way of life. Fully aware of the legal questions and of the solutions possible through the interpretations of the courts of both our State and our nation, we call upon our State government in both its executive and legislative branches to effect the following proposals:

- (a) To recognize that Catholic education, even if supported to a yet greater degree by laity and parents of children in the schools, cannot continue for much longer without governmental assistance in a significant manner.
- (b) To accept our sincerity when we say that:
 - (1) No funds are sought for religious purposes, since we fully accept the First Amendment of the Federal constitution. Therefore, all safeguards must be used to prohibit the use of public funds for specifically religious purposes or for any program of religious

instruction in the tenents or doctrine of our faith of any other.

- (2) We support, and indeed demand, not only the preservation of sound public schools, but the development of methods whereby assistance to non-public schools will not diminish State assistance to public schools, but rather reinforce it. We cannot accept arguments that assistance to the education of children in non-public schools will harm public schools; rather in the present fiscal crisis of public education we see viable, non-public schools as a remedy for the increasing costs of public schools. If the Catholic schools in one of the twelve largest urban areas of the State were to close, public education would suffer disastrous effects. Why then is not the converse also true? Public school costs are rising not simply because of increased costs of living and legally mandated increments; but because non-public schools are no longer absorbing even a proportionate share of the increasing school-age population.

Between June and September 1968 Catholic elementary and secondary school enrollments in New York State declined by over twenty-six thousand, in terms of per pupil costs (at \$1,140) this decline added some \$29.5 million to public school budgets. And this occurred when all school enrollments were projected to increase by some seventy-five thousand pupils. If the non-public schools had absorbed even ten percent of that increase, the cost to public schools due to enrollment growth would have been about \$77 million. Instead, including the decline of Catholic school enrollments adding \$29.5 million (transfer pupils are unlikely to go to other private schools), public schools had to assume their own share of increase in enrollments (\$77 million) plus the share of non-public schools (\$8.5 million) for a total of some \$115 million! This represents a \$38 million tax problem for New Yorkers this year!

And what about next year or the year after if current Catholic school enrollment trends continue, or if a policy of cut-back is instituted in any diocese?

- (c) To institute a program of financial assistance for pupils in elementary and secondary non-public schools in those fields wherein the schools meet the legal requirements of instruction and services.
- (1) We urge that this assistance be rendered toward those elements of a child's education which are recognizably secular and contributive to the common good.

- (2) We recognize the legitimate right and responsibility of the State to insure that such assistance shall be rendered only where specified standards of quality education are met and where the institution must render full accountability that the funds were expended solely for the purposes specified.

While we acknowledge the benefits to our pupils of the supplementary services already provided by the State in the forms of transportation, textbooks, and limited health services, we must also indicate that these are not serving the critical needs of the educational process of these children. Indeed our assistance to local public school agencies in providing for the administration of these programs, especially the Textbook Act, has actually been a cost to Catholic education in both financial and personnel resources.

- (d) To consider seriously the following forms of financial assistance to non-public school pupils and to institute them without delay.

- (1) Some type of non-public educational legislation which would:

- guarantee to parents a freedom of choice consonant with the State's responsibility in education.
- provide fiscal relief for parents and pupils in non-public elementary and secondary schools, adequate to meet their mounting financial problems, in the provision of secular education.
- take effect for the 1970-71 school year.
- permit the use of such funds toward any legally required instructional programs and services.
- provide for State supervision and school accountability within the recognized rights and responsibilities of both.
- be designed so as to take into consideration the economic needs and status of the community and families of the children served by the schools.
- assure equality of education for all.

- (2) Immediate Enactment of Legislation which would permit the State Education Department to include the participation of non-public school pupils in services and benefits of the Urban Education Program.

- (a) Since Catholic education is more committed proportionately to urban schools than is public education (55 percent of our enrollments are in the major urban centers vs. 47 percent of public schools), it is unreasonable and discriminatory on the part of the State to restrict children who meet the qualifications for State assistance from participation by reason of the school they attend.
- (b) Furthermore, in view of the precedent established by the federal government in the provisions of the Elementary and Secondary Education Act of 1965 and its subsequent amendments, we challenge as prejudicial and unjust the State's rigid interpretation of Article XI, Section 3. The State's Court of Appeals by reversing the Judd decision in its majority opinion for the Textbook case has provided ample grounds for validating the inclusion of non-public school children in the services of the Urban Education Program.
- (3) The establishment of a permanent Commission for Non-public Education which would:
 - (a) evaluate the needs of the non-public education of children for financial assistance from the State;
 - (b) supervise the provision of such financial assistance to qualified institutions;
 - (c) supervise the expenditure of such funds;
 - (d) in general, oversee the rights of non-public education in relation to the State and the rights of the State in relation to the private institution.

It should be noted that such a Commission would not replace the educational authority of the Board of Regents or the State Education Department. Its responsibilities would be limited to determination of legitimate financial needs and to proper fulfillment of legal requirements in the expenditure of State funds.

It is recommended that this Commission function under the authority of the Board of Regents, but not within the present structure of the State Education Department. The State Education Department has primary responsibility toward the financial welfare of public education in the use of State funds. It would be ambivalent to require the State Education Department to assess the needs of both segments of education in this State for presentation of budget requirements to the

legislature. Such a presentation would expose itself to assisting one segment at the expense of the other. Both should be considered independently, and neither should fear that the provision of services might have to suffer were the needs of others to be included.

Private Schools

Need Public Funds, Arian Says

TIMES-UNION •

Albany, Sat., Oct. 4, 1969 5

EDITOR'S NOTE: The plight of the private school, particularly the parochial school, has been a prime subject for discussion in recent weeks. Many Catholic schools face closing if some kind of outside support is not forthcoming. How serious are other church-operated day schools finding the problem and what are they doing to meet it. This is the first of a series of articles aimed at finding the answer. Another article will appear on next Saturday's Church Page.

By MEL GONICK

The American Dream has become so twisted that the right of education for all now apparently means only education in

education for their children even if they strongly desire it and feel that it more of a necessity than a luxury.

Some type of public support for families of those attending parochial and other specialized private schools is necessary if the American Dream is to be realized, the Hebrew Academy administrator believes.

He also personally feels that some kind of pooling of facilities might help these hard-pressed schools obtain the more sophisticated equipment and teaching tools necessary to provide a well-rounded education.

This pooling could first be attempted among the private

education. Only the primary grades were covered in the first years, but the school now includes Kindergarten through Grade 8.

While enrollment, 19 students the first year, has now increased to 135 this year, the budget has kept pace and is now at six times that of seven years ago.

Tuition is the main source of support for the school, with a few fund-raising events scattered throughout the school year.

There is some discussion under way in regard to establishing an endowment fund because the academy is looking forward to the day that it can move into

public schools, and "this is not fair," says Phil Arian, principal and one of the founders of the Hebrew Academy of the Capital District.

The Albany educator says a family should not be punished financially just because the parents want their children to receive a religious and cultural, as well as academic, education.

Sometimes the public does not realize that religious groups do not want to go to the public till, Mr. Arian said, and are perfectly willing to support their own schools as well as possible.

However, he adds, private education (parochial or not) is expensive and many parents are sorely-pressed to provide such

schools themselves to show the way, he adds, and then eventually take in public schools facility-sharing as well.

Tuition at the Hebrew Academy is approximately \$750 per year, including books, and even with scholarships offered to many students, almost all families sending youngsters to the school pay at least \$300 a year.

"And many of these people are not rich, some not even middle class," Arian says, "but they want their children to have the bi-cultural (Western-Hebraic) education we offer."

The Hebrew Academy of the Capital District was first organized about eight years ago and is now in its seventh year of op-

its own building and extend its program through the high school years.

The academy presently rents quarters from Temple Israel, 600 New Scotland Avenue, and this provides for both added expense as well as crowded conditions which prevent both needed and hoped-for expansion.

Mr. Arian believes that religious denominations are willing and able to accept the challenge of providing top grade education, but if the American Dream of equal opportunity for all is to be realized, some public support of the students and their families must materialize.

Mr. Arian summed it up very simply, "It's a real problem."

Private Schools Need Public Funds

Asian Says

Private schools in the United States are facing a financial crisis, according to a report by the National Education Association. The report states that private schools are losing money at an alarming rate, and that they are unable to raise enough funds to cover their operating expenses. The report also states that private schools are being forced to close their doors, and that this is a serious threat to the education of millions of children.

The report is based on a survey of 1,000 private schools in the United States. The survey found that 40 percent of the schools are operating at a loss, and that 20 percent of the schools are facing the possibility of closure. The report also found that private schools are receiving less public funding than in previous years, and that this is a major factor in their financial difficulties.

The National Education Association is a major advocate of private schools, and it is calling for increased public funding for these schools. It argues that private schools provide a high quality education, and that they are an essential part of the educational system. It also argues that public funding for private schools is a fair and reasonable way to ensure that all children have access to a good education.

The report also states that private schools are facing a number of other challenges, including rising costs for materials and salaries, and a decline in enrollment. It also states that private schools are often subject to government regulation, and that this can be a burden on their finances. The report concludes that private schools need public funds in order to survive, and that this is a matter of national importance.

The report is a call to action for policymakers and the public. It urges them to take steps to ensure that private schools have the resources they need to provide a high quality education. It also urges them to support the National Education Association's efforts to advocate for private schools.

City's Private Schools Flourish but Sense Demand for Change

By MICHAEL STERN

New York's private schools began the new year last week with their 26,000 seats filled and with many times that number of applicants knocking vainly at their doors.

But despite the extraordinarily strong demand for their services, the schools also are beginning the year with anxieties over their future, their ability to meet new challenges and their proper role as privileged institutions in a rapidly changing urban society.

"In one sense, we've never had it so good," said Carl W. Andrews Jr., headmaster of the tradition-rich Collegiate School, 241 West 77th Street. "For the foreseeable future, none of us will have any trouble filling our registers. But in another, more realistic sense, we've never had such problems."

Schools' Concerns Told

As the ringing of bells and the chatter of high, piping voices echoed again in their classrooms and corridors, Mr. Andrews and other private school heads closed the doors to their book-lined studies and, in interviews, listed these concerns:

Rising costs and their consequence, tuition increases averaging as high as 45 per cent in some schools this year.

The difficulty of finding and holding good teachers, made more difficult by the good pay contracts that public school teachers have been winning.

The fear that any expansion of private school enrollment will further weaken the troubled public schools by drawing away strong pupils and interested parents.

The difficulty of evolving new programs to satisfy student demands for more responsibility and more relevance.

The need to raise large scholarship funds to recruit the children of the poor and thereby end the one-class character of private-school enrollments.

But along with this account-

ing of troubles, the headmasters and headmistresses also spoke with pride and enthusiasm about forward-looking programs they are developing.

At the Chapin School, Mrs. Charles G. Berendsen spoke of the year-by-year enrichment of courses and of the school's success in introducing college-level work in the junior and senior high school years.

At the New Lincoln School, Dr. Harold C. Haizlit said upper-school students this year would do five days' work in four to free Wednesdays for seminars, community work, filmmaking, playwriting and other independent projects.

At Columbia Grammar School, James W. Stern told of a new trimester system being introduced this year, which allows students a much wider choice of electives and the chance to make up a failed course immediately instead of waiting until next year.

At Collegiate where the three-part year also is being introduced, Mr. Andrews saluted the generosity of parents and alumni, which is making possible full or partial scholarship aid to one third of the school's 512 boys.

All spoke of the new kinds of demands being made by their pupils. Addressing herself to this phenomenon, Mrs. Berendsen said:

"Independent thought in the teen years did not begin in the nineteen-sixties. Young people always have challenged the ideas of their parents. What is different now is that the children are less docile. Parents raise them that way and I think it is all to the good."

Earlier Responsibility

Acknowledging that educating less docile children is more difficult—and also more challenging—Mrs. Berendsen said that "what we have to do is let responsibility come to them sooner." At Chapin, this takes the form of a wide variety of late afternoon and Saturday

work with the poor in Yorkville and in Harlem.

It also takes the form of eliminating competition between girls—there is no honor roll, there are no prizes at graduation, at Chapin—but encouraging each girl to accept the responsibility of competing against herself to fully develop her own talents.

"One of the advantages of being small is that no one is anonymous here," Mrs. Berendsen said. "If a girl isn't doing her work, we know very quickly."

The radically changed school week at New Lincoln is the result of a year's work and study by the faculty, followed by a submission to the students, who made many criticisms and succeeded in making many changes.

"When I came here last year," Dr. Haizlit said, "I began asking why we were doing some things one way and others another. We found that although more than 80 per cent of the students' time is given to courses required by college admissions officers, the content of those courses and how they are taught is pretty much up to the school."

Students Plan Projects

Now, Dr. Haizlit said, teachers are excited by the prospect of doing innovative work, the students are planning many kinds of projects and the entire school, which was established as an experimental institution but recently had not been doing much experimentation, has developed a new spirit.

"This is just a beginning," the director said. "We intend to re-examine our program and our goals constantly. The children are changing every year and we have to change with them."

Another kind of change—toward greater cooperation among several private schools—is being discussed at Columbia Grammar.

Mr. Stern, the headmaster,

said that a study commissioned by his school, Baldwin, Elizabeth Irwin and Walden, showed that they could significantly cut their costs, without sacrificing their independence, by setting up joint programs in purchasing supplies, admitting students, hiring specialized teachers, buying food and other activities.

"Many of us don't like the idea of giving up the way we have always done things," Mr. Stern said, "but under the pressure of rising costs we are going to be forced into cooperation. I like the idea myself. It will relieve us of burdens and give us more time to devote to the children."

Doubling of Costs Seen

Some form of cooperation, and the tapping of new sources of money are recommended by Mr. Andrews in a 141-page report he wrote after spending a six-month sabbatical leave visiting 100 private schools in 20 states last spring.

Mr. Andrews found that costs were expected to rise 100 per

cent in the next 10 years and that parents of current pupils, who now supply most of the schools' income through tuition and contributions, would not be able to keep up.

"We could survive by taking in only the children of the rich," Mr. Andrews said, "but that would not be a good education for them and it would not be good for society."

One new source of income could be the private corporations and foundations, which now give large sums to higher education but only 5 per cent of their contributions to secondary schools, Mr. Andrews said.

Another, he said, would be government. Although 30 states now bar aid to non-public schools, Mr. Andrews believes this may change when state legislatures begin to count the cost of letting the parochial school systems fail for lack of money. And if government begins to give aid to the parochial schools, it may also help the independent schools.

City's Private Schools Flourish

but Sense Demand for Change

The city's private schools, which have long been a part of the educational landscape, are now facing a new challenge. As the demand for change grows, these institutions must adapt to the needs of the community. The private schools have traditionally provided a high-quality education, but they must now consider the broader social and economic factors that influence the educational experience. The demand for change is not just a call for reform, but a call for a fundamental rethinking of the role of private education in the city. The schools must be able to provide a relevant and engaging education that prepares students for the challenges of the future. This requires a commitment to innovation and a willingness to embrace change. The private schools have the resources and the expertise to lead the way in this effort, but they must also be open to the input and suggestions of the community. The demand for change is a reflection of the city's growing diversity and the need for a more inclusive and equitable educational system. The private schools have a unique opportunity to contribute to this effort by providing a high-quality education that is accessible to all. The demand for change is a call to action, and the private schools must respond with a renewed sense of purpose and commitment. The future of the city's private schools depends on their ability to embrace change and to provide a relevant and engaging education for all students. The demand for change is a challenge, but it is also an opportunity for the private schools to lead the way in creating a more inclusive and equitable educational system for the city.

**SUMMARY OF
THE EVALUATION OF THE CHICAGO BOARD OF EDUCATION
EXPERIMENT IN SHARED-TIME FROM SEPTEMBER 1965 TO JUNE 1969**

**A Report to the Chicago Board of Education
June 1969**

**James F. Redmond
General Superintendent of Schools**

**Department of Operations Analysis
Eileen C. Stack
Associate Superintendent**

SECRET

MEMORANDUM FOR THE SECRETARY OF THE BOARD OF EDUCATION
SUBJECT: THE BOARD OF EDUCATION'S POLICY ON THE
REQUIREMENT IN CARRIAGE-TRAIL FROM SEPTEMBER 1951 TO JUNE 1952

A REPORT OF THE BOARD OF EDUCATION
JUNE 1952

James F. Hargrave
General Superintendent of Schools

Approved: _____
Special Agent in Charge

This evaluation study was designed and the report was prepared by Dr. Joan M. Raymond, Coordinator, Department of Operations Analysis.

The study was facilitated through the cooperation and assistance of:

- the administrators who participated in the shared-time program -
 - Dr. Joseph J. Zbornik,
District Superintendent, District 12
 - Miss Dorothy Sauer,
Former Principal Kennedy High School
 - Mr. Alexander W. Burke,
Principal of Kennedy High School
 - Brother Terrence,
Former Principal of St. Paul's High School
 - Brother Raymond,
Principal of St. Paul's High School
 - Sister Dorothy,
Assistant Principal of St. Paul's High School
 - Mr. Samuel Dolnick,
Principal of Von Steuben High School
 - Rabbi Shlomo Rapoport,
Principal of Chicago Jewish Academy
 - Dr. Joseph Dunn,
Assistant Principal of Taft High School
- . the faculty of Kennedy High School
- . the parents of the 1969 shared-time graduates of Kennedy High School
- . the 1969 shared-time graduates of Kennedy High School.

Department of Operations Analysis
Eileen C. Stack
Associate Superintendent

SUMMARY OF
THE EVALUATION OF THE CHICAGO BOARD OF EDUCATION
EXPERIMENT IN SHARED-TIME FROM SEPTEMBER 1965 TO JUNE 1969

The Chicago Board of Education in 1964 and 1965 authorized the participation of three Chicago public high schools in an experimental shared-time program in which students would pursue part of their secondary education under the direction and control of the public school and the remaining portion under the direction and control of a nonpublic school.

The three programs and the dates of their operation were:

John F. Kennedy High School - St. Paul's High School
(September, 1965 - June, 1969)

Frederick W. Von Steuben High School - Chicago Jewish Academy
(September, 1965 - June, 1967)

William H. Taft High School - Luther High School North
(September, 1966 - June, 1968)

The experiment was authorized for a four year period, from September, 1965 to June, 1969, so that it would be possible for a group of students entering the shared-time program in 1965 as freshmen to participate until their graduation in 1969. In the initial planning, it was intended that a fifth year would be used for evaluation purposes, but subsequently it was considered advisable to conduct the evaluation study before the students who participated in the program for four years graduated and before the original authorization period for the program ended in June, 1969.

An evaluation study of the experimental shared-time program was, therefore, conducted between February and May of 1969. Because the Taft-Luther North and the Von Steuben-Chicago Jewish Academy programs remained in operation only two years, emphasis in the evaluation study was placed on the Kennedy-St. Paul program.

The evaluation was designed to explain the operation of the three shared-time programs; to measure objectively, insofar as possible, the effect of the program on the students; and to report the reactions of the parents, students, teachers, and administrators who participated in the program.

Information and reactions were obtained through interviews with the local administrators involved in the three shared-time programs, with all of the students who participated in the Kennedy-St. Paul shared-time program for four years, and with selected members of the Kennedy faculty. In addition, questionnaires were administered to all the members of the Kennedy faculty, to all the seniors who attended Kennedy full-time for four years, to all the seniors who attended Kennedy on a shared-time basis for four years, and to all the parents of the Kennedy students who attended Kennedy on a shared-time basis for four years.

Objective data were obtained through analysis of the permanent records of June 1969 graduates who attended Kennedy on a full-time or on a shared-time basis for four years and of the permanent records of senior students who transferred from the shared-time program to full-time enrollment in Kennedy High School. Information related to the operation of the three programs was obtained through examination of guidelines, correspondence, and records maintained in the three public high schools.

There were many similarities in the three shared-time programs authorized by the Chicago Board of Education. In all three programs the students who participated were required by Board action to reside within the attendance area of the public high school, to be eligible for full-time enrollment in the public high school, and to comply with the same rules and regulations as full-time students. In addition, each of the three programs involved an attendance arrangement between a public and a nonpublic school, the exchange and acceptance of grades and credits from one school by the other, the voluntary participation of students and parents, and the establishment of guidelines by the local administrators.

But, each shared-time program was also unique. The size of the program, the grade levels of the students who participated, the characteristics of the schools involved, the curriculum, and other facets of the program were different from school to school.

St. Paul's High School and John F. Kennedy High School were both new schools at the time the shared-time program was initiated, St. Paul's having been constructed primarily for the shared-time experiment. Neither school had an established faculty, established traditions, or established community allegiances. The shared-time program was implemented as a part of Kennedy's original program and as the entire purpose of St. Paul's program, and it was not necessary to adapt it to existing school programs. More importantly, St. Paul's High School program was not intended to be complete or to graduate students from a four-year program. Its curriculum was limited to two major academic subjects, English and social studies.

In addition, in the Kennedy-St. Paul program, the students were recruited for the shared-time program before their entrance to high school and they enrolled in the public and in the nonpublic school simultaneously; in general, they took two major subjects in the nonpublic school during each of their four years of high school, and these credits were transferred to the public school in which they took the remainder of their work and from which they graduated. In the Taft-Luther North program, the students were already enrolled in the public school on a full-time basis at the time they entered the nonpublic school for one subject, the credit for which was transferred to the public school from which they graduated. In the Von Steuben-Chicago Jewish Academy program, the students were already enrolled in the nonpublic school on a full-time basis at the time they enrolled in the public school for some classes, the credit for which was transferred to the nonpublic school from which they graduated.

The size of the three programs was another difference among them. The Kennedy-St. Paul program was thought to be the largest secondary shared-time program in the country, and national attention was focused on it since its inception. In June, 1969, there were 535 students attending Kennedy High School on a shared-time basis, 132 of them members of the 1969 Kennedy graduating class who had participated in the shared-time program with St. Paul's High School since

their freshman year. This group of 132 was the first group of students to have attended a Chicago public high school and a nonpublic high school, concurrently, for four years.

In contrast, the Taft-Luther High North and the Von Steuben-Chicago Jewish Academy programs were small in size and of short duration. Fourteen students participated in the Taft-Luther High North program for two years and eighteen girls participated in the Von Steuben-Chicago Jewish Academy program for two years.

In the Kennedy-St. Paul program, the students took English, social studies, and religion at St. Paul's, and all other subjects, including physical education, art, and music at Kennedy. In the Taft-Luther High North program, the students took all of their subjects, except social studies at Taft High School. In the Von Steuben-Chicago Jewish Academy, the students took only shorthand and typing at Von Steuben.

In the Kennedy-St. Paul program, the students spent approximately the same amount of time in each school. In the Taft-Luther High North program, the students reported to a Lutheran elementary school ninety minutes before their programs began at Taft for instruction from teachers from Luther High School North in social studies and religion. In the Von Steuben-Chicago Jewish Academy program, the students reported to the public school for two periods during the day and then returned to the Academy for the remainder of their programs.

The three programs provided three unique experiences with shared-time, and the details of their operation are equally significant and are carefully described in the evaluation study. Procedures related to programming, grading, placement, counseling, discipline, subject selection, curriculum, and transferring of credits are related both to the size of the three programs and to the degree to which the public schools were involved in the program.

An important part of the evaluation was an analysis of the impact of the shared-time program on the school performance of students who participated in it. Since Kennedy High School was the only Chicago public high school which was involved in a shared-time program for four years, this part of the evaluation was limited to those students who participated in the Kennedy-St. Paul program throughout their high school careers. Comparative data are provided for students who attended Kennedy High School on a full-time basis for four years.

On the basis of stringent statistical analysis of the data related to the school performance of graduates who attended Kennedy High School on a full-time basis for four years and of graduates who attended Kennedy High School on a shared-time basis for four years, the following summary profile emerged.

Compared with full-time graduates, shared-time graduates, on a group percentage basis:

- . possessed, on the average, greater general ability
- . took more college preparatory courses

- . received higher grades
- . were in fewer honors classes
- . earned about the same grade point averages
- . had similar class ranks
- . were more college oriented
- . received about the same scores on the ACT
(standard test used by most colleges for admissions purposes)
- . were absent less
- . participated in fewer extra-curricular activities at Kennedy High School
- . held fewer service jobs at Kennedy High School
- . received fewer honors at Kennedy High School
- . were elected to fewer offices at Kennedy High School

That this profile of the shared-time graduates compared with the full-time graduates of Kennedy High School emerged was, to a large degree, affected by the number of students who withdrew from the full-time group and from the shared-time group and by the ability level of those who withdrew from each group.

Thirty per cent of the students who enrolled in the shared-time program four years ago transferred at some time to Kennedy High School on a full-time basis and another thirteen per cent either dropped out of high school or transferred to another school. The withdrawal rate from the Kennedy full-time group was thirty-three per cent. However, a larger percentage of the lower ability level group withdrew from the shared-time program, and a larger per cent of the higher ability level group withdrew from the full-time group. Pertinent, also, is the fact that the shared-time students who wished to withdraw from the shared-time program had the option of transfer to full-time attendance at Kennedy High School and the full-time students had no transfer choice.

The reactions of the parents, students, teachers, and administrators who participated in the shared-time programs authorized by the Chicago Board of Education were also an important consideration in the evaluation of shared-time. It matters little if the program were administratively feasible and had no harmful effect on students if there were an adverse reaction to it by those who were directly involved in its operation. In fact, participant opinion might be the most crucial factor in the evaluation of the shared-time program.

Since the Kennedy-St. Paul program was the only one in operation in the spring of 1969, it was not possible to obtain the reactions of anyone other than the administrators in the Von Steuben and Taft shared-time programs. It was possible, however, to survey all the participants in the Kennedy-St. Paul program.

In general, the reactions of administrators who participated in the three shared-time programs authorized by the Chicago Board of Education were favorable. Perhaps, of more importance was the fact that their reactions were basically similar although their experiences with shared-time were dissimilar. However, they all related their opinions to their own programs and none indicated that they had experienced any serious difficulty with their shared-time operations.

The parents and students who participated for four years in the Kennedy-St. Paul shared-time program also reacted favorably to it. While there were criticisms and expressions of dissatisfaction by parents and students of certain aspects of the Kennedy-St. Paul program, one student's or parent's cause for complaint was another's reason for remaining in the program. Programming problems and longer days were the two items about which most of the parents and students were concerned, but almost all of them indicated that they would recommend the shared-time program to friends or relatives who are about to begin high school.

The teachers assigned to Kennedy High School were in general agreement that the shared-time program did not create additional work or problems for them. Moreover, they did not observe any harmful effects either to the school or to the students because of the shared-time program.

The evaluation of the shared-time experiment, according to the original charge by the Board of Education, was to determine if the program were in the best interests of the school children of Chicago and not detrimental to the public school system of the city. There was no evidence in the study that the shared-time programs in which the three Chicago public high schools participated had, in any observable, or measurable way, a harmful or detrimental effect on students or on the public school system of the city of Chicago.

It is inappropriate because of the uniqueness of the three shared-time programs to generalize the data and observations contained in the evaluation of the Kennedy-St. Paul, Taft-Luther North, and Von Steuben-Chicago Jewish Academy programs to other shared-time arrangements. This is particularly true in the case of the Kennedy-St. Paul program.

The findings of the evaluation study indicate that from the point of view of the Chicago public schools, the shared-time programs involving Kennedy, Taft, and Von Steuben high schools were administratively feasible and not detrimental to the program of education in the public schools. The programs appear to have provided opportunities for the students who were involved which they might not have had had they attended either the public or the nonpublic school on a full-time basis; any disadvantages which the students may have encountered appear not to have been of a serious nature.

It is recommended, therefore, that the Board of Education authorize the continuation of the Kennedy-St. Paul shared-time program, contingent upon the desire of the appropriate St. Paul's High School authorities to extend the program. It is recommended, also, that the findings of the evaluation be utilized as a basis for planning should additional shared-time programs at the high school level be considered.

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sion from June 4,
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A Roman Catholic Educator's Point of View

NEIL G. McCLUSKEY, S.J.

APPENDIX H

THERE has never really been a Catholic position on public support for parochial schools. Opinion among Catholics has always ranged widely on this as on every other controversial issue. There is a wide consensus that children in the parochial schools are entitled to a more equitable distribution of items which fall under the "child benefit" principle. There are leaders and groups firm in their insistence that Catholic school children are entitled to everything received by public school children. There are advocates of tuition plans and tax credit plans. There are Catholic officeholders, politicians and plain citizens who argue against any form of tax support for parochial schools—who argue as vehemently as the most doctrinaire supporter of exclusively public education. And there is a growing number of Catholics who wonder if perhaps the whole concept of separate schools for Catholic children has outlived its usefulness and who think that the future may lie with a third entity—a new kind of publicly supported school structure within which public and private groups can achieve their respective purposes.

A decade ago what Francis Cardinal Spellman (or local bishop) had to say about federal aid—at least in the public eye—the official Catholic position. Now things are different. A critical new ingredient has been added: the role rapidly being assumed by the Catholic laity across the country. What used to be viewed as (and to a large extent still is) a clerically run operation has become something much broader. Hundreds of thousands of Catholic parents in scores of communities are organizing themselves in order to put their case to the public in tones that are clear, strong and lay.

Public Agitation, Public Debate

Much of the impetus toward formal organization is coming from Citizens for Educational Freedom (C.E.F.), a group of parents and other individuals dedicated to the cause of securing freedom and equality in education—to quote its self-description. With over 1,000 chapters located in every state C.E.F. has become a force to be reckoned with. Already it has been instrumental in effecting action at both national and state levels for the benefit of public school children.

Some critics find C.E.F. hard to take. When

C.E.F. works for the election to public office of candidates favorable to bussing for nonpublic school pupils, its critics consider that action sinister, subversive of the democratic process. But when such an organization as Protestants and Other Americans United works for the defeat of those candidates, the same critics consider its action a defense of the nation and of the democratic process.

It is good that social grievances should be aired—if the airing is done in civilized fashion. But it is dangerous if an important segment of society feels itself the victim of social injustice and simmers in aggrieved silence. It would be sad indeed to find one day on American shores that painful Continental phenomenon, the making and unmaking of governments over the issue of support for religious schools. Calling forth as it does such deep-seated loyalties and ancient animosities, this issue is almost as volatile as is that of racial integration. If for no other reason, then, the debate must continue—but always in terms that are calm and restrained.

Contradictory Contentions

Unfortunately the school question has not usually been approached with the responsibility it warrants. Often ignored are the historical complexities and subtleties with which the issue has been bedeviled intermittently since the 1840s. Slogans and clichés are incanted ritually. One faction aims broadside at the other—or, rather, at positions that either were never held or have long since been abandoned or substantially modified. One side triumphantly establishes a case which the other side never hears. The argument goes on loudly and with impeccable logic, but from premises that are miles apart—and the two sides stay miles apart. Members of C.E.F. are deceiving themselves if they think the issue will be settled by a simple appeal to constitutional rights guaranteeing freedom of religion. Nor will P.O.A.U., the American Jewish Congress or the Horace Mann League—all inveterate opponents of public benefits to nonpublic schools—wave the problem away by quoting what they think Madison and Jefferson meant by the "wall of separation" between church and state.

The serious mischief preventing rational discussion is the tendency of legislators and journalists simply to fall back on the metaphor of "the wall" as a substitute for historical analysis and informed discussion. Provided it is not overworked, however,

there is still much to be said for that metaphor. More precisely, the concept is "independence" or "autonomy" rather than "separation."

On the other hand, when absolutism is applied to church-state relations it leads to trouble and contradiction. In his dissent in the landmark 1947 *Everson* (New Jersey) bus case Justice Wiley B. Rutledge was writing what under scrutiny becomes historical fantasy when he argued that the objective of the First amendment was "to create a complete and permanent separation of the sphere of religious activity and civil authority by comprehensively forbidding every form of public aid or support of religion."

For one thing, Mr. Rutledge can't have it both ways. If separation must be complete, permanent and comprehensive, and if a parochial school is simply an extension of the church, one wonders how the state can regulate even something that smacks of secular education in a parochial school, how it can, for instance, require attendance in that school's classroom any more than it can in the church itself.

The question is simple but the answer ignites controversy: Can the state distinguish (this is different from "separate") the secular from the religious in education? Increasingly the answer seems to be Yes. This is precisely the direction in which the child benefit doctrine has developed. As Justice Byron R. White wrote a year ago, ever since the Oregon school case in 1925 "a substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and prescribe subjects of instruction." Because of the state's interest in school standards the courts have ruled that instruction at home does not comply with compulsory education statutes.

The Key Issue: Religious Liberty

The constitutional argument is easily stated: Can church-related schools share in any general provision for government aid to all schools without violating the First amendment? Or is such support forbidden on the ground that it would favor church groups with educational commitments over other groups, church and nonchurch, which lack such commitments? It is not a question of whether religion or a church is helped or hurt by the fact that such benefits are provided in these schools as well as in the regular public schools; it is a question of whether the help or hurt that results is the kind of benefit or detriment forbidden by the First amendment.

Separation of church and state has validity only as a means to an end. In other words, the principle of separation is instrumental and subordinate to an end: religious liberty. Accordingly, the concept of religious freedom will determine how much separa-

tion of church and state does not guarantee freedom of religion; witness the Soviet Union where absolute separation has been decreed but where flagrant persecution of religion has long prevailed.

Back of the refusal of some people to accept the court-approved general welfare benefits for parochial school children (e.g., bus rides and textbooks) is the worry that "child benefit" has no limit other than what the Catholic community feels it can successfully push for. What rouses some non-Catholic opposition is not so much today's bused textbooks as tomorrow's salaries, buildings, and eventually a fully subsidized parochial school system. They see no guarantee that Catholics will limit their demands on the public purse to the so-called child welfare benefits. For Catholics the only answer is another question: Why should there be no guarantee? They look on the claim to share in general welfare benefits—including education—for themselves—not as a raid on the public treasury but as a civil rights matter to be argued in the civic arena.

A New Situation

No, the school question will not be solved simply by applying the old formulas or shouting the old battle cries that held through the 19th and the 20th century. For one thing, the pattern of American education has substantially changed. The sheer dimensions of the nonpublic school system—50 per cent Catholic—make its needs and its concern of others than the groups sponsoring it. This is the first argument in favor of public provision for all schools.

Despite a decline in enrollment through the 1960s, two years there still are 5.2 million pupils in Catholic schools—nearly 11 per cent of the total elementary and secondary school population. But that figure doesn't tell the complete story. In dozens of towns and suburban communities Catholic schools enroll 40, 50 and in some as much as 60 per cent of the school population. In Detroit and Cincinnati the figure is 24 per cent; in Philadelphia, 40. The figure for Boston is 35 per cent; for Milwaukee and New Orleans, 30 per cent; for Buffalo and Pittsburgh, 40. Half the children in Green Bay, Wisconsin, and of Manchester, New Hampshire, are in Catholic schools. In many of the country's largest cities, the Catholic school enrolls one-fourth or more of the total school population. Every third school child in New York City and Chicago is enrolled in a Catholic private parochial school.

When a concerned President tells the American people that our progress as a nation "cannot be swifter than our progress in education," neither the total American community can nor should it ignore the Catholic schools in its

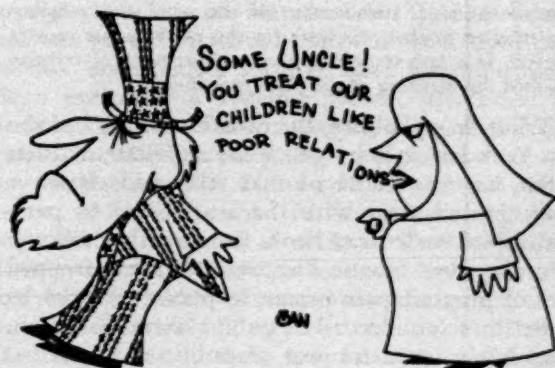
above; the quality of education there can be better than the quality of the Catholic schools within their borders. It is inconceivable that the youthful talent of the nation can be adequately developed without the inclusion of nonpublic schools in government programs designed for that purpose.

Practically speaking, the state has set up what amounts to a religious test: children in Catholic schools would qualify for free schooling and all related benefits the state provides for its junior citizens *except* that their parents have placed them in Catholic schools. If public benefits are so administered that citizens must do violence to their consciences in order to share in them, then the benefits are discriminatory. Perhaps Catholic parents should look at things differently; their feelings of frustration are, however, not assuaged by being told that they are "free" to have their own schools — not as they watch increasing subsidies for public schools steadily pricing Catholic school education out of the market. It may be that this issue is coming home to the American public in a less than idealistic way. The financial picture of parochial school education has been steadily darkening. It is predictable that unless there is immediate public support is forthcoming many parochial schools will be forced to shut their doors. Given the straitened financial circumstances of most of the big city public school systems, the prospect of the wholesale transfer of tens of thousands of children from parochial to public schools induces nightmares. Meanwhile, some Catholic education leaders argue that the present proportion of youngsters in Catholic schools can be maintained if public support can be found for certain items in the broad category of child benefit, and if there can be appropriate cooperation between public and private education.

The Bogey of 'Establishment'

There is a school of thought which immediately equates any kind of cooperation between government and nonpublic schools with some form of *establishment*, which sees any collaboration between church-sponsored schools and the state as leading to fusion of church and state or to establishment of a state church. Such fears can lead to the grossest absurdities. A few years ago the executive director of the Northern California-Nevada council of churches filed a complaint with the San Francisco board of education charging that the employment of publicly paid truant officers to enforce attendance of children in parochial schools was "a complete violation of the separation of church and state." Three years ago a New York city board of education lawyer ruled that a Jewish high school lad's wearing a *kippah* on his head during class hours constituted a breaching of the wall of separation between church and state.

good there have always been patterns of cooperation between the state and church groups. The First amendment was not devised by the founding fathers to prevent church and state from working together. Though it is possible to interpret the amendment so as to require complete separation between the American state and the churches, in practice there has been cooperation and collabora-



tion between them. For anyone — whether a Supreme Court justice or a propagandist from P.O.A.U. or the American Jewish Congress — to hold that this is not so is to ignore history.

Just what is the permissible area of legislation which, in rendering incidental benefits to pupils, does not subsidize their church school? The favorable decision by the Supreme Court in the 1947 *Everson* case with its 5-4 split illustrates how one justice's benefit is another justice's subsidy. In upholding bussing — a form of assistance in no way related to a church's religious function — the majority opinion said that the New Jersey statute "approaches the verge" of acts impermissible under the First amendment. Certain other benefits — provision of milk and lunches, for instance — appear equally constitutional, since the benefit is plainly to the child and not to the school itself. Moreover, loans for specific purposes not closely related to religious instruction or ceremony were provided for in Title III of the National Defense Education act of 1958; church schools (including secondary and elementary schools) could borrow funds for equipment to improve the teaching of science, mathematics and languages. This precedent was cited in the preparation of the Elementary and Secondary Education act of 1965. Programs of this nature "advance specific national purposes, and their relationship to the religious function of a church school is remote."

Court in the *Cochran* case (upholding free textbooks for Louisiana's parochial school pupils) rested on the child benefit principle. The case was not contested on the issue of the First amendment; it remained outside the "establishment of religion" area. However, that issue too should be laid to rest after the Supreme Court ruling of June 1968, which by a 6-3 decision upheld the New York state textbook law. Speaking for the majority, Justice Byron R. White said:

We are unable to hold . . . that this statute results in unconstitutional involvement of the state with religious instruction or that [the law], for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

Earlier, in upholding the constitutionality of the New York law, two judges of the appellate division of the supreme court of that state had drawn a meaningful analogy with the availability to parochial school students of books from a public library. Even the most fanatical separationist has stopped short of proposing that access to public libraries be denied those children. Yet public libraries contain many books, paid for out of public monies, that could be used to promote religion!

Opponents of the New York textbook law based their case on this contention: "There is no such thing as secular education in a sectarian elementary or secondary school. The whole curriculum is permeated by religion." It is true that some Catholic writers on education have long talked about how religion permeates the Catholic school. Sometimes Chesterton's remark that there is even a "Catholic" way to teach mathematics is used to buttress the "permeation" philosophy. Whatever the great G. K. had in mind, his remark is meaningful only when understood as reflecting the influence of Catholicism on any phase of a man's life. As St. Paul long ago reminded people, whether they are eating or drinking or traveling or thinking they should be doing it for God — so that "in all things God may be honored." In this sense there is a Catholic way of eating strawberries and a Catholic way of teaching mathematics and a Catholic way of practicing politics.

If there are no legitimate God-given values in human activity outside of revealed religion, then we reach ultimate absurdities. Moreover, as the defendants' brief argued, "if there is no secular education in such schools, then New York's Compulsory Education Law, as related to these schools, is completely baseless and New York's public policy . . . is unfounded." Finally, if there is "no such thing as secular education" in Catholic schools, the state should suppress them. The court did not agree: it upheld the law.

For anyone who has considered the pile of court cases since 1947 dealing with the question of publically supported bus transportation for nonpublic school children, the inconsistencies, contradictions,

and prejudices which are interlarded with the decisions rendered are bewildering, to say the least. An incisive decision handed down in 1945 by the Kentucky supreme court cut through the emotional rhetoric of the absolute separationists in words that have still not got through to a lot of people:

In this advanced and enlightened age, with all of the progress that has been made in the field of humane and social legislation, and with the hazards and dangers of the highway increased a thousandfold from what they formerly were, and with our compulsory school attendance laws applying to all children and being rigidly enforced, as they are, it cannot be said with any reason or consistency that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose.

Federal vs. State Interpretation

When tests are made in state courts, however, the problem most often lies in the narrow, restrictive wording of the state constitution rather than in lack of concern on the part of voters, legislators and judges. This is why the citizens of certain states — New York and Wisconsin are examples — finally modified their state constitutions in order to extend the benefit or protection of bussing to all school children.

A number of state cases have upheld tuition payments to sectarian institutions in special circumstances. Thus grants for the support of dependent, wayward, neglected or physically handicapped children in church-sponsored homes and institutions have been upheld on the basis that such payment is reimbursement, not use of appropriated funds governed by the state constitution. Since tuition grants directly to the pupil do not contravene the federal constitution, it would seem that, given the appropriate enabling legislation, any state could do for the general category student what it now does for the special category student.

Those who refuse to acknowledge the child welfare principle as operative here dismiss the weight of the *Everson* decision, claiming that it settles only the federal question. They point instead to the state constitutions, most of which contain explicit bars to the use of public funds for any but public school purposes. Here we have an anomalous situation: state constitutions in contradiction to the federal Constitution.

One may be pardoned some impatience on hearing that some proposed bus law in, say, Missouri or Indiana would violate the First amendment or breach the "wall of separation" between church and state. Since the federal question is settled, it is hard to understand how anyone can raise the issue with sincerity. This is all the more true since the Supreme Court in 1961 again reaffirmed its position in the *Everson* case by declining to review an appeal from a decision of the Connecticut supreme court favorable to the bussing of par-

children. Perhaps there are valid arguments based on expediency or public policy which opponents of tax-supported buses for parochial school children might call upon, but separation of church and state is no longer one of them.

A New Concept Appears

In his concurring opinion in the 1948 *McCullum* case Justice Robert H. Jackson made an observation about *Everson* which like an unexploded time bomb is still ticking away. He said that if the school board's resolution in the *Everson* case had been "for protection of the safety, health or morals of youngsters it would not merely have been constitutional to grant it; it would have been unconstitutional to refuse it to any child merely because he was Catholic." That is the central question, which has to be squarely faced by the courts. Someday the principle must be tested. Legislative provisions which attempt to outlaw any and every form of direct assistance to church-sponsored schools are probably unconstitutional because they conflict with the First amendment's guarantee of religious freedom and with the Constitution's guarantee of equal protection" under the law.

One can readily agree with Mark De Wolfe Howe's wish that Justice Hugo L. Black, who wrote the majority briefs, "had spoken with greater caution in the *Everson* and *McCullum* cases." The eminent member of Harvard University's law school faculty stated the critical point: Mr. Black's "resounding absolutes in respect to the religious disabilities of American government," he wrote, represent a "simplistic analysis" and "may still serve to delay and possibly to prevent the adoption of a national educational program of the dimensions the times require."

Practice Outruns Theory

What can we expect in the future? If the courts find unconstitutional certain measures for assisting parochial school pupils — provisions in the National Defense and the Elementary and Secondary Education acts, for instance — the scene may heat up. In places where awareness of a heavy Catholic population (and potential political clout) is a fact of political life, ways will be found to keep parochial education afloat. On the same score, more help can be expected from the federal government than from the states. At this writing more than a score of state legislatures are considering legislation similar to that already passed (but not tested in court) by Pennsylvania and Ohio, which would allow the state to pick up the bill for the teaching of such ostensibly neutral subjects as physical education, science and modern languages in nonpublic and nonprofi-

Since 1947 a dozen cases involving religion and education have been decided by the Supreme Court, and a decision has ostensibly piled another

layer atop the wall separating church and state. Yet today more public tax support goes to children in parochial schools than before 1947. What is the explanation for this paradox? Well, apparently American society has decided that there are ways to help children in nonpublic schools within the letter and spirit of the Constitution and has forthwith gone ahead and employed them — "wall" or no.

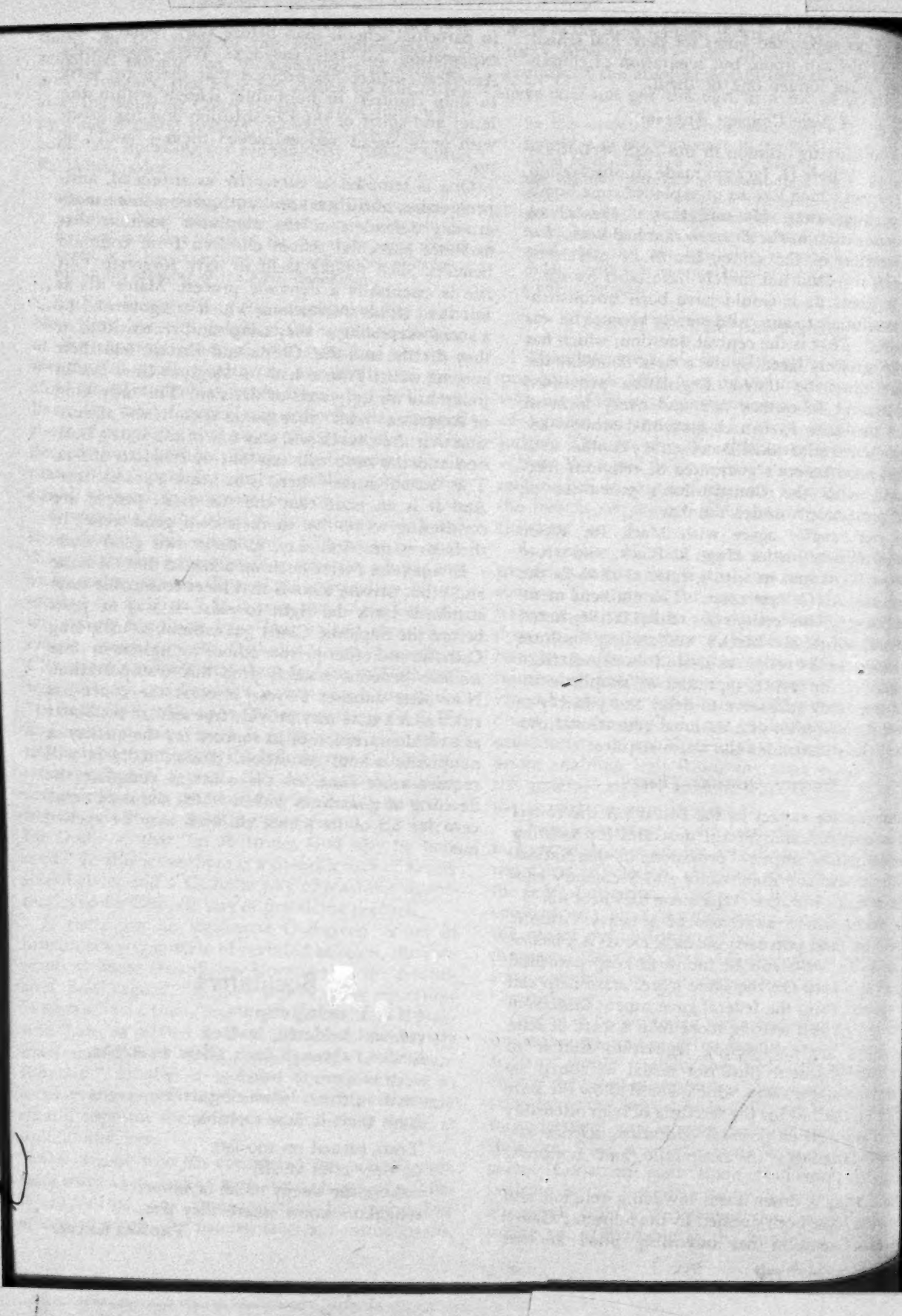
One is tempted to categorize as antisocial, anti-progressive, antiliberal and antiquarian those modern-day defenders of the absolutist position that excludes parochial school children from common benefits. Such people seem to have forgotten that life is essentially a dynamic process. Man's life is mirrored in his institutions, which are governed by a social metabolism: they adapt and reconstitute or they decline and die. China and Britain had their ancient walls; France had its Maginot line; Berlin today has an ugly wall of division. The only kind of American "wall" that makes sense is the affirmation that the church will stay out of the state's business and the state will stay out of religious affairs. The "school issue," then, is at heart a social issue. And it is an issue that the American people are continuing to resolve in their own good sense, in their own practical way, in their own good time.

In 1925 the *Pierce* decision affirmed that Catholic and other private schools that meet reasonable state standards have the right to exist. It was 22 years before the Supreme Court got around to including Catholic and other private school youngsters in state welfare benefits, notably free bus transportation. Now after another 22-year interval the court has ruled that a state may provide free secular textbooks as a valid expression of its concern for the quality of nonpublic school education. Undoubtedly it will require more time for the court to complete the devising of guidelines within which the state's concern for all of its school children may be spelled out.

Backbiters

+ LIKE racing engines
red and laddered, leading
shadows through back alleys to smoke,
fiery tongues to watch
exciting the cold waiting dark
from their hollow mouths.

Tears turned on too late
(if time cries at all)
to save the sleepy name of home:
neighbors know where they live.



Parochial School

If our schools are to justify our faith in them, there must be a rebirth of national concern with that unique American invention, the separation of church and state.

PHILIP JACOBSON

+ SYMPTOMATIC of our sick society is the travail of the public schools. This fundamental instrumentality of our socialization is beset by a bewildering variety of problems: persistently inadequate financing, demands for both desegregation and decentralization, far-reaching curriculum changes necessitated by technological and social upheavals, crippling strikes, and all the woes that affect most institutions in our decaying urban centers. Rather than an aid in reconstruction, our schools seem destined to become a victim of the times.

Casting still another shadow on the long-range future of public education is the recent decision of the United States Supreme Court in *Board of Education v. Allen* (June 10, 1968), upholding by a vote of 6 to 3 a New York statute requiring local school boards to buy secular textbooks and "loan" them without charge to nonpublic, including parochial, school children. This ruling has received far too little public attention, perhaps partly because authorities are disagreed as to its probable effects.

Msgr. George A. Kelly, secretary for education in the Roman Catholic archdiocese of New York, called the Allen decision "a Magna Carta for the parents of nonpublic school children," adding that public and nonpublic school education are now "working partners and will prosper or go bankrupt together." On the other hand, Leo Pfeffer, special counsel for the American Jewish Congress, called it a "narrow decision," merely following an earlier Supreme Court ruling which had upheld the constitutionality of tax-paid bus transportation of children to parochial schools.

I

The Supreme Court certainly will have ample opportunity to spell out much more precisely in the years ahead the limits, if any, of permissible tax assistance to church-related education; for on the same day that it handed down its ruling in the textbook case it declared that federal taxpayers have

the legal right to contest the expenditure of federal funds on the ground that it violates the religion clauses of the First amendment. The court thus overruled a 1923 decision which had denied federal taxpayers this privilege because, it was said at the time, their tax payments were too small to give them an appreciable interest in the matter.

While it would be foolhardy to read into a Supreme Court decision more than the court intended, it would be dangerous and shortsighted to miss the possible thrust of the majority's explanation in support of its ruling in the textbook case. The logic there employed may well determine the court's future course; may determine whether, in fact, a public-parochial school partnership is on the educational horizon. Let us look, then, at some passages of special interest in that ruling:

Underlying these cases, and underlying also the legislative judgments that preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence and experience. Americans . . . have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

In the light of earlier Supreme Court decisions, this is an extraordinary statement. Of course, each of its affirmations has always been true. Yet on four separate occasions during the past 20 years the United States Supreme Court declared that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Seemingly, the court majority now has reached the conclusion that the parochial school is not a religious institution!

Equally curious is the majority's statement that

Mr. Jacobson is widely known in intergroup-relations and religious circles for his writings in the church-state field.

means that many parents have found them to be doing an acceptable job in secular education. Maybe so; but then again maybe not. It could be that many parents simply want their children educated in a familiar sectarian atmosphere, without ever having given serious thought to the school's competence in providing secular instruction. Or they may be sending their children to private schools because the local public schools are overcrowded or otherwise deemed unsatisfactory.

II

But is the competence of the parochial school in the realm of secular instruction really the issue? The much more basic question, and one that is far more important to the future of the public school, is this: Is the so-called "secular" education given in the parochial school really a form of religious instruction?

No doubt, the court majority had this question very much in mind when it left the final decision for another day, saying that it could not agree that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." The majority went on to explain that the case had come to it after "summary judgment," that is, without a trial, so that "nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books . . ." Quite so. But neither was there anything in the "meager record," as the court described it, upon which to reach the conclusion that a "wide segment of informed opinion . . . has found that these schools [private and parochial] do an acceptable job" of providing secular education. Evidence of the sectarian character of the education — all the education — given in parochial schools was indeed lacking in the "meager record," but it was not at all difficult to come by.

The *raison d'être* of the parochial school is, or at least once was, that the main purpose of education is to instruct the young in what God purposes. After that, it has several secondary or tertiary purposes: to develop skills essential for learning, such as reading and writing; to prepare for a life as a useful member of society and of the family. From this it followed that religion must be the integrating thread in all of the educational process of the parochial school; that religion must permeate all phases of the curriculum, including secular instruction. In a word, if a parochial school is designed to fulfill its essential reason for being, the sacred and the secular are inseparable

within its walls. Accordingly, parochial school educators have said repeatedly — and with understandable pride — that the church-related school is the place for the child to learn systematically about his religion, to deepen his sense of religious dedication, to capture for the rest of his life a love of and loyalty to his religious heritage.

In our pluralistic, democratic social order, these are commendable goals for parents who want that kind of religiously colored education for their children. The question still to be decided by the Supreme Court is whether all Americans, of every religious persuasion or of none at all, are to be taxed for these sectarian endeavors. Distressingly few Americans appear to have any patience with that question today. Nevertheless, it is a question we ignore at our national peril.

III

The all-embracing sectarian character and purpose of the parochial school comes more sharply to the fore in light of the test the court majority elected to use in the textbook case:

. . . what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion.

In applying this test — of legislative purpose and primary effect — has the Supreme Court laid on the judicial shelf, at least for the time being, its oft-repeated assurance that "no tax in any amount" may be levied in support of any religious activities or institutions? Is it to be inferred that the court majority thinks of the parochial school as just another public school with a little religion added?

Constitutional scholars and political scientists are showing marked interest in the guidelines used by the court majority in deciding the textbook case. For example, Professor George LaNoue of Teachers College, Columbia University, is asking how the legislative intent will be determined. By the stated legislative purpose? Among the purposes on which the New York legislature grounded the textbook law was the intention to aid in the national defense. Now, it takes no great insight — or foresight — to conceive of legislators' writing into bills in aid of, say, parochial school construction that their purpose is nothing less than the national defense. Indeed, overzealous legislators may one day base enactments in payment of ministers' salaries on the beneficent purpose of strengthening the national morals and, consequently, the national defense.

Do these concerns seem too far-fetched to be taken seriously? Consider the thought advanced by Nathan Lewin, deputy to the assistant attorney general



case of Portland. There is no doubt that the teaching of the subject matter in this manner in a public school would be contrary to law.

In practical terms, what will a public-parochial school partnership mean? It could mean — again, it must be emphasized that this is by no means certain — that the public treasury will be called upon to provide at least 80 per cent of the parochial school budget; that is, every phase of the school's curriculum other than outright religious instruction, which probably takes but one period a day. If this is the meaning of the textbook decision, the United States Supreme Court may well have sealed the fate of the public school. Notwithstanding the partnership embrace, there will be a scramble for the tax dollar which will almost certainly prove a crushing experience for the public school, and with good reason:

(1) The church-related school is free not only to teach religion; it may provide, as well, a "God-centered" secular education for children whose parents desire that type of schooling. The public school, on the other hand, is not only foreclosed from giving sectarian religious instruction; it may not even sponsor nonsectarian prayer and Bible reading exercises. Parenthetically, this presents an interesting paradox: the public school constitutionally barred from sponsoring prayer and Bible reading, while a tax-supported parochial school presumably could provide sectarian instruction and saturate every phase of its secular curriculum with a religious emphasis.

(2) The parochial school, being private, may be as selective as it chooses in its enrollment policy, whereas the public school, being public, must necessarily accept all children, without discrimination.

Many church schools, although barred from federal funds under Title VI of the Civil Rights act if they discriminate on racial grounds, will nevertheless maintain largely white enrollments if only because of the sectarian appeal of private schools and the economics of running them.

In a great many instances, of course, the racial imbalance may be entirely incidental to the sectarian composition of the school, which may well explain the complaint made by Richardson Dilworth, president of the Philadelphia school board:

Today, in our city, approximately 40 per cent of the total school population is in parochial and private schools. The result is that while only 30 per cent of our city's population is non-white, 57 per cent of our public school pupils are non-white. And, today, there are more white children in the parochial and private school system. If this trend continues . . . then 20 to 25 years from now, our big cities may find themselves with public school systems almost entirely non-white, and parochial and private school systems at least 90 per cent white [quoted by Joseph M. Cronin in "Negroes in Catholic Schools," the *Commonweal*, October 7, 1966].

charge of the civil rights division of the justice department, at a conference of Orthodox Jewish leaders in September 1967:

It is entirely possible . . . that by 1980 the concept of public welfare legislation and governmental financial support for otherwise private associational activities may have expanded to the point where Congress could constitutionally enact a National Religion Assistance Act. Such a statute might recognize that religious activity in the United States could not continue without federal financial support and that religious life is part of the fabric of our society . . . [p. 53 in a pamphlet on the conference published by the National Jewish Commission on Law and Public Affairs].

IV

The second part of the test used by the court majority in the textbook case — whether the enactment advances or inhibits religion — may pose even more troublesome problems for the court. How does a teacher use a textbook? Skilled teachers have been known to use *Mein Kampf* to teach a lesson in democracy. Why won't a dedicated parochial school teacher, properly intent on saturating every phase of her classroom instruction with a religious purpose, use the most secular of textbooks to inject that specialized type of sectarian instruction?

There is much evidence that such is indeed the practice. To cite but one example: In the *Dickman* case, the Oregon state supreme court considered a challenge to a statute which made textbooks available to parochial schools at public expense. It said:

The evidence establishes, and the trial judge found, that the purpose of the Catholic church in operating the St. John's school and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion. The study guides used by the teachers in St. John's school indicate that, to some extent at least, the use of the textbooks furnished by the district is inextricably connected with the teaching of religious concepts. These study guides were prepared by the superintendent of schools of the district.

is well known, the church-related school is in large measure the haven of children of reasonably well educated, higher-income parents. Moreover, the private school is free to select children on the basis of high academic quality and to exclude the emotionally disturbed, the trouble-makers, those with a high rate of failure or a high dropout rate.

(3) Finally, the church-related school is exempt from public control; the paying public has no voice in its management, policies or purpose. Thus, obviously, a public-parochial school partnership would involve no contest in the appeal for public favor. The result, in time, would be a vast proliferation of denominational schools; a spectacular growth of nonprofit private secular schools which, in all likelihood, will be even more selective in their student enrollment than the parochial schools; and a greatly deflated and depressed public school—for the poor, the racial minorities, the culturally deprived, the misfits, society's rejects.

Should that happen, grave dangers would threaten our democratic societal fabric. Where would be the neutral ground for the kind of democratic education that our public school has represented? Where would be the neutral ground for the contending philosophies that are always welcome in the public school—in contrast to the ultimate, sectarian dogmas of the parochial school?

This overview of the public school is eloquently stated by Justice Brennan in the *Schempp* (Bible reading) case:

... It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. . . . This is a heritage neither theistic nor atheistic, but simply civic and patriotic. . . . Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. . . . The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own . . .

V

Is the picture I have painted much too gloomy, particularly in light of the court's implied caveat that the secular instruction of the parochial school must not be so intertwined with the religious as to be inseparable from it? Only time holds the answer to that question. If the curriculum and structure of the parochial school remain substantially unchanged, the Supreme Court may yet agree that the secular and the sectarian are inextricably intertwined, and approve tax aid only for bussing and other auxiliary services. But there is evidence that

those responsible for church-related education are beginning to see the need to desectarianize their institutions—to transform their Notre Dames into replicas of Yale, Harvard, Princeton—so as to make them eligible for public funds. This need was recognized when, in 1966, Maryland's highest court struck down state grants to three denominational colleges—two Catholic and one Protestant—on the ground that they were sectarian in their curriculum practices, their student bodies, their management and control. At the same time, the court refused to interfere with a similar grant to a fourth (Protestant) college because it lacked these sectarian characteristics.

Reflecting on the Maryland decision, which the United States Supreme Court declined to review, Daniel A. Degnan suggested (in *America*, May 23, 1968), as a first step, a changeover to a secularized Catholic university, a new composition of the boards of trustees, and a shift to a "neutral or nondenominational policy." But while Catholic colleges would thus become "truly secular," Degnan continues, they should maintain "strong departments of Catholic theology" and present opportunities for "students' growth in faith" through religious instruction and activities. "Theology and the life of faith," Degnan concludes, "are not incompatible with the concept of a neutral, secular university . . ."

Translate these ideas to the elementary and secondary levels: Will the courts then be confronted with a "nonsectarian parochial" school? Will these "neutral" schools still have as their main purpose the instruction of the young in the divine purpose? How will the secular instruction relate to the all-important central purpose?

The grave difficulty these questions present for the Catholic Church is apparent from a comment on William Ball's article "The Pennsylvania Compromise" (*America*, October 26, 1968) wherein he justifies that state's method of aiding parochial education: the creation of a nonpublic school "Authority" which is empowered, with the aid of state-raised funds, to "purchase" secular education services in nonpublic, including parochial, schools. Mr. Ball, who helped fashion the "compromise," defends this device, saying that any religiously permeated instruction would not be compensable under the act, there being controls that would guarantee the secularity of the purchased instruction. James W. Kirby, S.J., president of St. Ignatius High School of Cleveland, in a letter to *America* (November 23) expressed dismay over Ball's "attempts to justify the secularization of Catholic education in Pennsylvania." Kirby is concerned that the "kind of controls included in the Pennsylvania bill hit at the heart of what Catholic education is all about—a value-centered education." And he adds, "I agree with those who will have no part of such a sell-out."

Ironically, the differences here exposed com-

Orphans of the Universe

+ LIKE a naive guest for virgin love
 Hesitant heroes baptize themselves in blood
 Anoint sandbagged altars
 With gut wound roses.
 Fate's armed progeny
 Catapulted to the corridors of hell
 Writhing spirits in mud caked bodies
 Cower before that uncouth bastard
 Who dares in groaning finality
 With half a body pasted to trench walls
 To curse God's glorious seven days' work
 Crawl in blind defiance of fact
 Like beaten bloodied dogs
 Toward deliverance at a dug-in position
 Along the greased machine gun barrel
 Feast forlorn eyes on sharp curls of concertina
 And then split between your teeth

And against regulations
 Light a cigarette
 And with a burst of machine gun jargon
 Discuss one night's last lovely whore.
 Orphans of the universe
 Consigned by unreconciled fate
 To the dark side of man's nature
 Your hope is denied destiny
 Your food the death of comrades
 Shroud your fear in barren rage
 Camouflage ripped chests with medals
 Plug gut wounds with sterile citations
 Embrace the ardor of your loneliness
 And know the sentries of your red ordeal
 Are the million mute ghosts
 Of Time's ravaged warriors.

MAURICE COCCHI.

the fore at the very moment when much thought is being given in Catholic circles to the continuing validity of the parochial school. (I speak mainly of Catholic parochial schools because they are attended by 90 per cent of the private-school children in this country.) For example, Gerald P. Fogarty observes (*America*, September 28, 1968): "In the light of developments during the past 80 years, the historical reasons for establishing parochial schools are no longer valid." He points out that these schools came as a protest against the publicity-supported, Protestant-oriented public schools of the 1840s; that Archbishop John Hughes had appealed to the New York Public School Society (a private organization which, nevertheless, had a virtual monopoly over the New York city school system of those days) for neutral schools which Catholic children could, in conscience, attend. The society ignored Archbishop Hughes's appeal and introduced the King James Bible and Protestant prayers into the public school curriculum, where they remained for many years. But today, Mr. Fogarty notes, the public schools are providing the neutral education the archbishop called for.

Legal and other niceties aside, we need to be reminded (à la Mr. Dooley) that the Supreme Court reads the election returns." Doubtless the "returns" will be read in terms of what the Supreme Court calls "informed opinion," as revealed by legislative action and other forms of public expression. But legislative action, as so many of us have to learn, is quite often a reflection of the

religious realities in law-making. Two examples:

One was the Michigan legislature's adoption of a bill for auxiliary educational services for parochial school children. The vote in favor was 90 to 9 in the House, 33 to 1 in the Senate.

The other example: While the nonpublic school "Authority" bill was pending in the Pennsylvania legislature — and making very little headway — the Philadelphia diocesan newspaper, in a front-page editorial, put the governor on notice: "Catholics of the Commonwealth now know that they cannot number among [their] friends Governor Raymond P. Shafer and the Republican leadership in Harrisburg. We Catholic taxpayers have been patient with this administration too long . . ." (Quoted in the *Commonweal*, June 7, 1968, page 350). The report goes on to say that Assemblyman Mullen, the sponsor of the bill, "nearly succeeded in wrecking the Governor's 1968 budget and tax program by refusing to allow it out of the House Appropriations Committee [Mullen was the minority chairman] until Shafer promised consideration of the parochial school bill. The tension brought the Governor and the Pennsylvania trade mission he was accompanying back early from Europe to meet with the Catholic bishops. . . ."

These illustrations are cited not only because we hope to demonstrate that legislative action is hardly a fair barometer of "informed opinion," but also to make the additional point that the essential genius of the beneficent church-state separation doctrine lies in the fact that it puts tax aid for religious

other public officials.

VI

Where are we today? All answers to this question must relate to the revolutionary ferment unloosed by Pope John XXIII when he moved to "let some fresh air" into his church. A sage observer of the current scene, Paul A. Reynolds, professor of philosophy at Wesleyan University, offers a candid opinion (*The Christian Century*, August 7, 1968):

The whole concept of separation of church and state was based on the assumption that the church was a supernatural agency whose ministry was quite distinguishable from that of the state. All this is now compromised. How did it happen?

Reynolds' answer is that today "prayer and sacred rituals are no longer existential encounters with the holy"; churches are now classified as mere agencies of "social service." One example he cites is the parochial school, which "once was said to have a peculiarly pervasive religious and supernatural purpose; today the insistence is . . . that such schools are in no way suffused with any religious ideas; that physics, say, is just plain mundane physics, with no special relevance to divine doctrine or immortal salvation." So, he concludes, our problem today is no longer the "relation of the sacred and secular, or church and state." Today, the role of the church is no longer distinguishable from government. The question then is not "whether the state should tax a man to support religion (since religion and secularism are indistinguishable), but whether the state should tax a man to finance private policy makers in education."

How did it all happen — here?

It is difficult to know where to start in answer to that question, or how to apportion the blame, but it may profit us to attempt a brief exploration:

There are numerous well intentioned people — they include jurists, politicians in high places, religious leaders, educators — who seemingly are convinced that the separation principle is amenable to a safe compromise. The church schools, they tell us, are in serious financial difficulty; ghetto children suffer grave educational deprivation (as indeed they do); and the parochial schools are contributing to the education of America's youth. Why not, they ask, relax the principle, concede the not-too-serious infractions, yet leave the doctrine reasonably intact?

The futility of compromise of separation is revealed in the brief history of the National Defense Education act. This legislation was America's initial response to Sputnik. It provided grants in aid of public education and loans to sectarian schools. When objection was raised at a congressional committee hearing to the inclusion of church-related schools as beneficiaries of public funds, the explanation offered was that the education act was limited

to aids to strengthen instruction in mathematics, physical sciences, and foreign languages (after all, you don't teach religion by way of an algebraic equation). Hardly anyone paid attention when the act later was expanded to extend to the teaching of English, history, the social studies — virtually every phase of the school curriculum.

Again, there are those — we think here of editorial writers and policy makers for the great newspapers — who act in these matters largely out of political instinct and with little regard for long-range consequences. For example, many newspapers unwaveringly supported President Johnson in his advocacy of the "compromise" represented by the Elementary and Secondary Education act of 1965. Only three years later, many of these very same newspapers criticized with equal vehemence the Supreme Court decision on textbooks, apparently unaware that the 1965 E.S.E. act, and likewise the New York statute which the Supreme Court has upheld, make it possible for local school boards to provide textbooks for parochial school use.

Finally, there are those who apparently believe that the "ecumenical" spirit of our age calls for at least a partial abandonment of the separation principle. "We get along quite well now. We understand one another, trust each other. What need is there for a wall of separation?" Perhaps only time — with history repeating itself — will serve to demonstrate that the surest guaranty of religious peace is a true voluntary church and a high, impregnable wall of separation between that church and the state.

The American public school was a revolutionary concept linked to a great humanitarian dream: the development of an informed citizenry and the achievement of the goals of American democracy. Henry Steele Commager observed in a memorable statement (*Life* magazine, October 16, 1950), "Our schools have kept us free; they met the challenge making us a nation. In the intervening years, the essential tool of democracy has come upon difficult days, as have many institutions serving our decaying urban centers. But, as Professor Commager went on to say, if society "clearly defines the new duties it wishes our schools to fulfill and if it steadfastly supports them not only with money but also with faith, they will surely justify that faith in the future as they have in the past."

But if our schools are to justify our faith in the future there must be a rebirth of national concern with that equally unique American invention, the separation of church and state. To be sure, there are overriding concerns — Vietnam and the ghetto. But we dare not neglect the church-state issue. We look to the courts as the sole and final arbiter of the issue. Each of us must awaken to the dangers which one day prove to be quite as damaging to the national well-being as Vietnam and the uprising in our ghettos.

NEW YORK TIMES, October 1, 1969

Connecticut Challenged in Suit Over Aid to Nonpublic Schools

By JOHN DARNTON

Special to The New York Times

10/1/69 p. 34

HARTFORD, Sept. 30—A suit as a major test and expect it to reach the high court. challenging the constitutionality of state aid to parochial and other nonpublic schools was filed today in the United States District Court for Connecticut.

The action, sponsored by the Connecticut Civil Liberties Union and 10 other organizations and individuals, sought an injunction to halt the allocation of \$6-million in direct state aid to the private schools.

The money was provided for in a bill passed by the State Legislature on June 3. It was designed to bring financial relief to the state's hard-pressed Roman Catholic institutions.

Under the basic provision of the bill, which became effective July 1, the state would pay 20 per cent of the salary of an instructor who teaches secular subjects in any of the 360 private schools.

The plaintiffs argued that such payments violated guarantees of religious liberty and the separation of church and state in both the Connecticut and the United States Constitutions.

In addition they maintain that the funding would contribute to the existence or growth of de facto segregation in private schools, in opposition to the 14th Amendment.

A Key Clause

When the legislation was passed, its supporters felt that the inclusion of a clause specifically prohibiting reimbursement for teachers of religious subjects kept it within constitutional bounds.

A similar law in Pennsylvania—also based on the "purchase of services" formula—is currently being challenged in a Federal Court there.

In New York, proposals for direct state aid to parochial schools were not passed by the Legislature and a bill making religiously affiliated colleges and universities eligible for state aid was vetoed by Governor Rockefeller.

Previous New York legislation permitting the state to bear some of the costs for buses, lunches and text books in private schools has been upheld by the United States Supreme Court.

Lawyers for the Civil Liberties

One of the plaintiffs in the suit is the Connecticut State Conference of Branches of the National Association for the Advancement of Colored People. At a news conference, William Jones, the organization's executive director, said parochial schools show "a deliberate design to exclude nonwhites."

Incentive Provision

Mr. Jones said that an "incentive" provision of the state-aid bill, gearing the salary reimbursements to the proportion of students from low-income families, would not be effective in correcting racial imbalance.

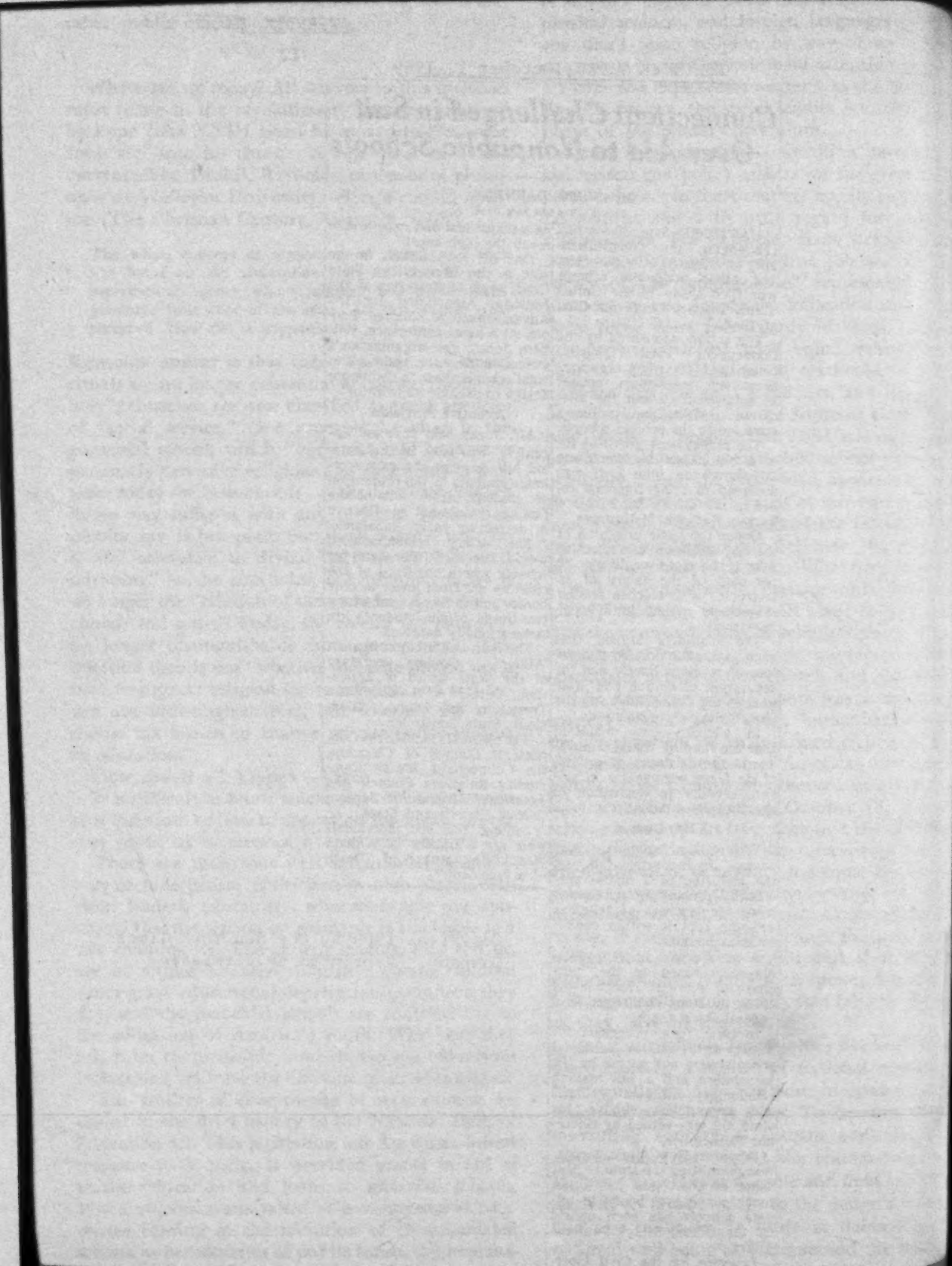
The salary reimbursement would rise to 50 per cent for schools where one-third of the children are from lower income homes and to 60 per cent where two-thirds of the students are "educationally deprived."

The suit was brought against William J. Sanders, secretary of the State Board of Education, Gerald A. Lamb, State Treasurer, and Louis I. Gladstone, State Controller.

The plaintiffs include the Connecticut Council of Churches, the Connecticut Jewish Community Relations Council and Americans United for Separation of Church and State.

Among the six individuals who are plaintiffs is William Manchester, author of "Death of a President."

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NEW YORK TIMES, June 8, 1969

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State Aid to Nonpublic Schools Challenged in Pennsylvania Suit

Special to The New York Times

6/8/69

PHILADELPHIA, June 7 — State aid to nonpublic schools was challenged here this week in a suit filed in the United States District Court for Eastern Pennsylvania.

Six religious, civil rights and educational organizations and three taxpayers asked the court to declare such aid unconstitutional.

A spokesman for the plaintiffs said that Pennsylvania had been selected as the site to test nationally all legislation providing aid to nonpublic schools.

The complaint asserts: "This is a civil action brought for a temporary and permanent injunction against the allocation and use of funds of the Commonwealth of Pennsylvania for the support of, or to finance in whole or in part, sectarian schools and other private schools whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion and to declare such use as violative of the First and Fourteenth Amendments to the Federal Constitution."

Judge William H. Hastie, chief judge of the United States Court of Appeals for the Third Circuit, was asked to name a three-judge panel to hear the case. Leo Pfeffer, a lawyer for the plaintiffs, said at a news conference that the case would probably go to trial in the fall of this year.

The three-judge panel would include judges from the Court of Appeals and would thus obviate any appeal to that court. The strategy was that the appeal would go directly to the Supreme Court.

The Pennsylvania Nonpublic School Aid Act, the first of its kind in the country, was passed last year. Nonpublic schools are to receive \$4.2-million from the

commonwealth this year. The Pennsylvania House has passed a bill increasing this year's funds to \$21-million and the allocation next year to \$41.4-million.

Msgr. Edward T. Hughes, superintendent for the Roman Catholic Archdiocese of Philadelphia, said of the suit that he was "saddened at this action" but was "confident that justice and equity will be assured for all children in Pennsylvania."

The plaintiffs are:

The Pennsylvania State Education Association.

The Pennsylvania Conference of the National Association for the Advancement of Colored People.

The Pennsylvania Council of Churches.

The Pennsylvania Jewish Community Relations Conference.

Americans United for Separation of Church and State.

The American Civil Liberties Union of Pennsylvania.

Mrs. Richard G. Morrell.

Mrs. Priscilla Reardon, Alton J. Lemon.

The suit was filed by Henry W. Sawyer 3d, a lawyer.

Named as defendants were:

David H. Kurtzman, State Superintendent of Public Instruction.

Grace Sloan, State Treasurer.

St. Anthony's Roman Catholic Church School, Chester.

Archbishop Woods Catholic Girls High School, Warminster.

Ukrainian Catholic Holy Ghost School, Chester.

Germantown Lutheran Academy.

Germantown.

Akiba Hebrew Academy, Merion Station.

Philadelphia Montgomery Christian Academy, Wyncote.

Beth Jacob Schools of Philadelphia.

The suit contends that "nonpublic schools . . . are de facto, racially segregated, either by religious requirement, design, tradition, policy, quota, cost, or residential pattern and the aid rendered to such school will perpetuate and promote segregation in that said subsidy will further enable private schools to increase their enrollment."

STATES DEBATE AID TO PRIVATE SCHOOLS

The issue of state aid to parochial and private schools was introduced in at least thirty-one Legislatures this year.

Four States—Ohio, Rhode Island, Connecticut and New York—are among those approving aid to private schools, with certain restrictions. Several other States authorized aid to students attending private institutions.

Two States—Massachusetts and Maine—approved constitutional amendments dealing with the issue for submission to the voters.

PENNSYLVANIA'S AID CHALLENGED

A challenge to Pennsylvania's direct aid to parochial schools, which gained legislative approval in 1968, was filed in June in the United States District Court in Philadelphia. The suit, brought by six major organizations, alleges that the aid violates the First and Fourteenth Amendments to the Constitution. The case is scheduled for trial in the Fall, with any appeal expected to go directly to the United States Supreme Court.

Pennsylvania's nonpublic schools were to receive \$4.2 million from the State this year.

OHIO APPROVES \$35.77 MILLION

The 1969 Ohio General Assembly approved a total of \$35.77 million in state aid to nonpublic schools for the 1969-71 biennium. An appropriation of \$18.27 million was approved for fiscal 1969-70, and \$17.5 million was authorized for fiscal 1970-71.

In 1967, the Ohio Legislature had authorized payment of a subsidy to nonpublic, as well as public, schools for the provision of services and materials to disadvantaged children. Legislation passed by this year's General Assembly substantially expanded the 1967 act. The 1969 legislation authorizes state aid for "supplementary education service contracts" entered into between school districts and lay teachers who teach state required secular courses in nonpublic schools. In order to qualify for such salary supplements, the nonpublic school teacher must be certified by the State and the nonpublic school must meet State Board of Education standards. Other provisions in the 1969 legislation pertain to the nonsectarian nature of textbooks, and the quality and costs of services compared to those offered in public schools. In addition, the State Superintendent of Public Instruction is required to review the educational standards of nonpublic schools.

CONNECTICUT APPROVES AID

In June, the Connecticut General Assembly approved \$6 million in state aid to nonpublic

schools. Under the plan, the State will pay 20 percent of the salary of a teacher of secular subjects, and the State will allow also ten to fifteen dollars per child for nonreligious textbooks. The State also will pay 50 percent of teacher costs if one-third of the school's enrollment is educationally deprived children, and subsidize up to 60 percent of such cost if two-thirds of the enrollment is educationally deprived. The act also calls for "open enrollment" in nonpublic schools, that is admitting Connecticut children regardless of religion, with state aid being paid proportionately.

Written into the act is a provision for a speedy court test, allowing for such a challenge to be filed even before the first funds are paid in September 1970.

RHODE ISLAND SALARY SUPPLEMENTS

The Rhode Island Legislature, before its May adjournment, approved a measure authorizing \$375,000 in state salary supplements to teachers in parochial schools. The act attempts to exclude payment to members of religious orders by requiring that, to qualify, teachers receive a minimum salary of \$4,000. They also must teach only secular subjects, use only teaching materials used in state public schools, and have been awarded a board of education teaching certificate. (See State Government News, June 1969.)

OTHER STATES' ACTIONS

In June, the Massachusetts Legislature, meeting in a constitutional convention, approved a proposed constitutional amendment to supplement salaries of certain teachers in privately controlled schools. The amendment must be passed again by the 1971-72 Legislature before it can be put on the 1972 ballot for voter ratification.

The Maine Legislature approved a constitutional amendment which would permit the State to lend up to \$25 million at any one time to private colleges for building construction. The amendment will be voted on in November if a special election is called. Before its July adjournment, the Legislature also passed an act that will permit the Education Department to approve payment of tuition to private secondary schools if they are accredited by the New England Association of Colleges and Secondary Schools. Previously, such tuition payments could only be paid to schools meeting state standards, which includes teachers certified by the State.

The Minnesota Legislature has passed an act providing funds to reimburse school districts for sharing class time with parochial schools in such specialty courses as home economics and shop work.

In Illinois, administration measures to provide \$32 million in state aid to private and parochial schools and \$14 million to private colleges and universities passed the House, but died in Senate committees. The Legislature adjourned June 30.

New York's constitution bans aid to church affiliated schools and on this basis Governor Nelson Rockefeller this year vetoed a legislative measure that would have aided church affiliated colleges. The 1969 New York Legislature authorized a total of \$24.1 million in state aid to private nonsectarian colleges for the 1969-70 academic year.

The 1969 Washington Legislature approved a \$600,000 scholarship fund for tuition aid to needy students. The recipients may attend private and sectarian institutions of higher education, as well as public schools.

In Oregon, the Legislature approved \$1.3 million in \$100 grants to state residents attending private colleges.

A commission to study the parochial school problem was created by the 1969 New Hampshire Legislature before its July adjournment. A special commission was also appointed in Maryland in March to study the question of state aid to parochial schools. Bills calling for such aid are being prepared by several Maryland legislators for introduction in the 1970 Legislature. An earlier effort to provide state aid to church affiliated colleges in Maryland was ruled unconstitutional.

The Kentucky Catholic Conference has announced it will ask the 1970 Kentucky Legislature to permit a "purchased-services" program under which parochial schools would be paid by the State for giving instruction in nonreligious subjects. Several Kentucky Catholic schools already have "shared-time" agreements with nearby public schools in some secular subjects.

The California Legislature passed an act authorizing school districts to reimburse parents of handicapped or retarded children for education expenses at private, nonsectarian schools when public school facilities are unavailable. The bill now awaits gubernatorial action.

Efforts to provide state aid to parochial and nonpublic schools died in the Michigan, Vermont, and North Dakota Legislatures. Direct state-aid legislation failed in several other States, while some form of aid is being considered by other Legislatures.

COURT DECISIONS ON SCHOOL AID

The U.S. Supreme Court has yet to render a definitive decision on the issue. In 1947 the Supreme Court supported the constitutionality of state-supported bus transportation for parochial students, ruling that the aid helped the children and not the schools. The court also upheld the Elementary and Secondary Education Act of 1965, which provides federal funds to public and paro-

chial schools on the basis of the number of poor children in each district, on the ground that it was based on aid to children rather than to institutions.

It also upheld the lending of textbooks bought with public funds to parochial pupils in New York in a June 1968 ruling. But, it has recently left standing a lower court ruling holding state aid to church affiliated colleges in Maryland unconstitutional.

KENTUCKY COORDINATES STATE SOCIAL SERVICES

Two human resources coordinating groups were formed in Kentucky in July to help make the State's social services more effective.

The coordinating groups, Governor Louie B. Nunn said, will eliminate many instances of "overlapping, fragmentation and inconsistencies in human services." The new Human Resources Coordinating Commission will consist of the heads of eight state departments that deal with people and their problems. The other group, the Human Resources Coordinating Council, will include both lay and professional people, as well as the recipients of state social services.

UTAH COURT UPHOLDS LEGISLATURE

Six legislative appointments to Utah's new State Board of Higher Education were declared constitutional by a state district court in July.

Governor Calvin L. Rampton had challenged the right of the Senate President and the House Speaker each to appoint three board members. The Governor appoints the other nine members of the fifteen-member board. (See State Government News, July 1969.) The Governor contended that the appointments were legislative intrusion into the executive branch, on the basis that the state constitution gave the Governor the power to appoint the education board members.

In its ruling, the court said that an act of the Legislature is legal when the constitution does not prohibit it. It also said sufficient precedents for the law existed.

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69

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Supreme Court, U. S.
FILED

AUG 18 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. **72-269**

THUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

and

~~FEDERAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHEIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, New York,~~

Appellants,

and

~~EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,~~

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
HOWARD SQUADRON,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS LEVITT AND NYQUIST

LOUIS J. LEFKOWITZ

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Attorney for *Appellants Levitt and Nyquist*
The Capitol
Albany, New York 12224

ARTHUR KESSLER TOCH
Solicitor General

JOHN M. COON
Assistant Solicitor General

of Counsel



INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Statute Involved	4
Question Presented	5
Statement of the Case	6
The Question is Substantial	9
Conclusion	19
Appendix A—Majority Opinion	20
Appendix B—Dissenting Opinion	34
Appendix C—Final Judgment Appealed From	39
Appendix D—Notice of Appeal	41
Appendix E—Chapter 138 of the New York Laws of 1970	44

CONSTITUTION.

United States Constitution, Amendment One	3, 5, 6, 13, 14, 15
New York Constitution, Article XI, § 3	6, 13

STATUTE CITATIONS.

7 United States Code, § 1431	13
12 United States Code, §§ 1749-1749c	13
20 United States Code, §§ 236-244, 331-332	14
20 United States Code, §§ 401-589	14
20 United States Code, §§ 701-757	14
20 United States Code, §§ 1001-1144	14
28 United States Code, § 1253	3
28 United States Code, § 2281	2, 3
28 United States Code, § 2284	2, 3
38 United States Code, § 911	14
40 United States Code, §§ 484(j), 484(k)	14
42 United States Code, §§ 29-92	13
42 United States Code, § 1751	13

II.

	PAGE
New York Education Law, McKinney's Consol. Laws, Article 17	9
New York Education Law, McKinney's Consol. Laws, § 216	12
New York Education Law, McKinney's Consol. Laws, § 305(2)	10, 12
New York Education Law, McKinney's Consol. Laws, §§ 801, 803, 806-808, 3002	12
New York Education Law, McKinney's Consol. Laws, § 3204	9, 12
New York Education Law, McKinney's Consol. Laws, § 3205	12
New York Education Law, McKinney's Consol. Laws, § 3210	9
New York Education Law, McKinney's Consol. Laws, § 4601	12
New York Real Property Tax Law, McKinney's Consol. Laws, § 420	12
New York Laws of 1970, chapter 138	2, 3, 4, 6, 10, 11, 12, 15, 17

CASE CITATIONS.

<i>Board of Education v. Allen</i> , 392 U. S. 236	4, 9
<i>Early v. DiCenso</i> , 403 U. S. 602	7
<i>Everson v. Board of Education</i> , 330 U. S. 1	9, 14
<i>Flast v. Cohen</i> , 392 U. S. 83	3
<i>Lemon v. Kurtzman</i> , 403 U. S. 602	4, 7, 9, 15, 16, 17, 18
<i>Tilton v. Richardson</i> , 403 U. S. 672	4, 9, 14, 15, 16, 17

IN THE

Supreme Court of the United States

October Term, 1972

No.

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, New York,

Appellants,

and

EARL W. BRYDGES, as Majority Leader and President *Pro Tem* of the New York State Senate,

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD SQUADRON,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS LEVITT AND NYQUIST

The appellants Arthur Levitt and Ewald B. Nyquist, pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinions Below

The opinion of the majority of the Judges in this case, sitting as a statutory Court of three Judges, written by the Hon. MORRIS LASKER, Judge of the United States District Court for the Southern District of New York, and concurred in by the Hon. PAUL R. HAYS, Associate Judge of the United States Court of Appeals for the Second Circuit, sustained the complaint, held Chapter 138 of the New York Laws of 1970 to be unconstitutional, and enjoined the further implementation of the statute by the defendants Levitt and Nyquist. The Hon. EDMUND PALMIERI, Judge of the United States District Court for the Southern District of New York, dissented in a separate opinion. The majority opinion, the dissenting opinion and the final judgment appealed from are set out in the Appendix hereto and marked as Appendix "A", "B", and "C" respectively. There is as yet no citation of this opinion.

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code,

Sections 2281 and 2284. The judgment holds Chapter 138 of the New York Laws of 1970 to be unconstitutional on the ground that it violates the Establishment Clause of the First Amendment to the Constitution of the United States, and enjoins the defendants Levitt and Nyquist from making payments under that Chapter to nonpublic schools in the State.

The complaint sought declaratory and injunctive relief against Chapter 138, alleging that the statute violated the Establishment Clause by providing payments to nonpublic schools in the State as partial reimbursement to the schools of the cost of providing testing and record keeping services to the State, as required by State law or regulation.

The final judgment granting the relief sought in the complaint was made and entered June 1, 1972. Notice of Appeal on behalf of defendants Levitt and Nyquist was filed on June 19, 1972 in the United States District Court for the Southern District of New York (a copy of which is made Appendix "D" hereto). Notices of Appeal were also filed on behalf of intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School on June 30, 1972, on behalf of intervenor-defendant Earl W. Brydges on July 1, 1972, and on behalf of Bais Yaakov Academy for Girls and Yeshivah Rambam on July 10, 1972.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, Section 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Flast v. Cohen*, 392 U. S. 83

[1968]; *Board of Education v. Allen*, 392 U. S. 236 [1968]; *Lemon v. Kurtzman*, 403 U. S. 602 [1971]; and *Tilton v. Richardson*, 403 U. S. 672 [1971].

Statute Involved

Chapter 138 of the New York Laws of 1970, provides as follows in pertinent part (the full text is set out as Appendix "E" to this statement):

"Section 1. It is hereby determined and declared as a matter of legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

"That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

"That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

"Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

"§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

"a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

"b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

. . .

"§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

"§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law [which prohibits discrimination in pupil enrollments]."

Question Presented

Does the partial reimbursement of nonpublic schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States where the records are kept and the

tests administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of attendance of pupils and in accordance with the requirement that such nonpublic schools provide an acceptable minimum standard of education to the pupils so enrolled?

Statement of the Case

Plaintiffs, suing on behalf of themselves and their children, commenced this action seeking to have Chapter 138 of the New York Laws of 1970 declared unconstitutional, alleging that it violates the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statute violates Article XI, section 3, of the New York Constitution, which prohibits the expenditure of public moneys to or in aid of sectarian schools, except for examination and inspection. The complaint also sought an injunction restraining the implementation of the law, insofar as it provides money for sectarian schools.

A motion was made by the defendants seeking dismissal of the action on several grounds, among which were that the complaint failed to state a claim upon which relief could be granted, and dismissal of the complaint as to one defendant, Nelson A. Rockefeller, on the ground that the complaint sought no relief against that defendant and that he had no power or responsibility in the administration of the law. The latter part of the motion was granted by the District Court (LASKER, J.). Defendants also sought dismissal of the action on the ground that the complaint raised a threshold question of validity of the statute under the Constitution of the State of New York and that that question should be determined in State Courts prior to the

commencement of a Federal Court proceeding. That application was denied.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Subsequent to the granting of an order for the convening of a three-judge District Court, interrogatories were served by intervenor-defendants on the plaintiffs and by plaintiffs upon defendants and intervenor-defendants. The answers to those interrogatories are exhibits to the record in this case.

The District Court, in its decision, found the New York statute to be unconstitutional under the Federal constitutional provisions and did not rule on the contentions made as to constitutionality under the State constitutional provision. The Court based its decision upon the recent decisions of this Court in *Lemon v. Kurtzman* and *Early v. DiCenso* (403 U. S. 602). The Court found that the nature of the aid provided under the New York statute is the same as that provided under the Pennsylvania act in *Lemon*, that is, "financial assistance paid directly to the church-related school." The Court found inapplicable any analogy to bus transportation, school lunches or textbooks as "secular, neutral, or nonideological" services, on the basis that the greatest proportion of the funds are payable as reimbursement for administration of tests and that testing "is an integral part of the teaching process." An actual or potentially excessive entanglement between government and religion was also found by the Court, as was a potential for "aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation".

The dissenting District Judge (PALMIERI, J.) would have found the statute to be a "legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law." Judge PALMIERI's opinion pointed to the fact that the statute provides for only a fractional reimbursement of the cost of record keeping and testing required of nonpublic schools by State law and regulation. The dissenting opinion further observed:

"A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U. S. 672, 678 (1971), that

'candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication'

and that '[j]udicial caveats against entanglement' are a 'blurred, indistinct and variable barrier.'"

The dissenting judge would have found that reimbursement for testing and record keeping constituted payment for a neutral, secular and nonideological purpose, and was, thus, constitutional.

Subsequent to the entry of judgment a motion was made on behalf of the Majority Leader of the New York State Senate, Earl W. Brydges, for leave to intervene as a defendant. That motion was granted. Motions for a stay of the injunction pending appeal to this Court were also made and were denied.

The Question is Substantial

Over a period of years, this Court has considered the question of what form of payments or aid may be provided to nonpublic schools or to children enrolled in them. The Court has held that school bus transportation may be provided to children attending sectarian schools (*Everson v. Board of Education*, 330 U. S. 1); that textbooks may be provided to children attending church-related schools (*Board of Education v. Allen*, *supra*); that public moneys may be spent for the construction of academic buildings at church-related colleges (*Tilton v. Richardson*, *supra*); and has also held that payments may not be made either to schools or to individuals for the cost of teaching or teachers' salaries (*Lemon v. Kurtzman*, *supra*). None of those cases have involved the precise question here at issue, that is, whether the State, having mandated that nonpublic schools keep certain records and administer certain tests to determine whether or not the children enrolled in those schools are receiving a full-time and adequate education, may reimburse those schools for all or a part of the cost of those record keeping and testing services.

This Court has never had occasion to rule upon whether the State which imposes administrative burdens upon nonpublic schools may also alleviate those burdens by reimbursing the schools for all or a part of the costs thus imposed.

New York State has set minimum standards of educational quality through the requirements of various sections of the Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools

must be "at least substantially equivalent" to that of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected.

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regent's examinations, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 3, 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils.

In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of making sure that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike (see defendant Nyquist's answer C-2 to plaintiffs' Interrogatories, and Exhibit E attached thereto).

The expressed purpose of Chapter 138, as set forth in the first section of the Act, is to insure, through examination and inspection, that the young people of the State enrolled in nonpublic schools are attending upon instruction as required by law and are maintaining levels of achievement which will adequately prepare them for "the challenges of American life in the last decades of the twentieth century."

The expressed purpose of the statute is further to compensate the nonpublic schools for the services mandated by State law or by regulation of the Commissioner of Education as set forth above. The sum of \$28,000,000 has been appropriated for payments for this purpose to be made in each fiscal year since the enactment of the law.

In April, 1970, a background informational study was done in relation to Chapter 138 and is attached as Exhibit F to the answers of defendant Nyquist to plaintiffs' interrogatories. That study, in three pages, lists the different types of record keeping and testing performed by the non-public schools pursuant to law or regulation.

Subsequent to the enactment of Chapter 138, another study was prepared by three research consultants, each operating independently, analyzing the cost of the mandated services for which compensation is made pursuant to Chapter 138. It concluded that the \$28,000,000 specified in the law for the mandated services compensation is justified on the basis of the actual costs to the schools in performing those services. This report is attached to defendant Nyquist's answer to plaintiffs' interrogatories as Exhibit D. In all cases, the amount expended either in the school as a whole or on a per pupil basis was found to be substantially greater than the amount of compensation received from the State for those services. For example, it was found that the average per pupil cost for mandated services is \$82.50 per year, as contrasted with the Chapter 138 formula of \$27.00 per pupil at the elementary level and \$45.00 per pupil at the secondary level.

In October, 1971, a study of the costs of administration of only three required tests was made and submitted to the Regents (Exhibit G to defendant Nyquist's answers to

plaintiffs' interrogatories). That study showed that those three tests alone cost the nonpublic schools on the average of \$19.00 per pupil. That study also concluded that the per pupil allocation of Chapter 138 was justified on the basis of the actual costs of the services provided.

As stated in the dissenting opinion of the Court below, New York's educational system has been, for purposes of supervision at least, a unitary one for many years, ever since the initial creation of the Board of Regents early in the nineteenth century.

New York's legislative history clearly shows the incorporation of nonpublic schools within the State's ambit of educational concern. For example, in the State of New York nonpublic schools are chartered by the Board of Regents (Education Law, § 216). There is regular inspection by the Education Department of the nonpublic as well as the public schools (Education Law, § 305[2]). Nonpublic schools are exempt from taxation (Real Property Tax Law, § 420). Attendance at a nonpublic school complies with the State's compulsory education law (Education Law, § 3204) and satisfies the requirement for part-time attendance (Education Law, § 4601). Terms of attendance in the nonpublic as well as the public school are prescribed (Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (Education Law, §§ 3204, 801, 803, 806-808, 3002).

The State has not only imposed these requirements on the nonpublic schools but it has also recognized the importance of insuring that these requirements are complied with by both sectarian and nonsectarian nonpublic schools. In furtherance of that interest, an exception was incorporated into the New York State Constitution's pro-

hibition against the use of public moneys in aid of denominational schools, authorizing the use of public moneys "for examination or inspection" (Article XI, § 3).

It has long been recognized both legislatively and judicially, that the First Amendment to the Constitution of the United States does not prohibit all contact between government and religion. Federal funds for missionaries to the Indians were first paid under President Washington and continued until 1900 when changed conditions on the reservations, not constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act (Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92).

Many other Federal statutes have provided nondiscriminatory aid to students attending both public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act (60 Stat. 230 [1946], 42 U. S. C. § 1751), free milk under the Agriculture Act of 1949 (63 Stat. 1051 [1949], 7 U. S. C. § 1431), the National Defense Education Act of 1958

(72 Stat. 1580 [1958], 20 U. S. C. §§ 401-589), College Housing Act of 1950 (12 U. S. C. §§ 1749-1749c), the Higher Education Facilities Act (77 Stat. 363 [1963], 20 U. S. C. §§ 701-757, *Tilton v. Richardson*, 403 U. S. 672 [1971], the Higher Education Act (79 Stat. 1219 [1965], 20 U. S. C. §§ 1001-1144), the Elementary and Secondary Education Act (79 Stat. 27 [1965], 20 U. S. C. §§ 236-244, 331-332), the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations (58 Stat. 765 [1944], 40 U. S. C. §§ 484 (j) and 484(k); 107 Cong. Rec. 17351), and the G. I. Bill of Rights (66 Stat. 663 [1952], 38 U. S. C. § 911).

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment prohibition of an establishment of religion does not bar nonpreferential aid to all schools, all pupils, or all institutions, regardless of their religious affiliation.

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case (*Everson v. Board of Education*, 330 U. S. 1 [1947]). In that case, this Court held that the nonpreferential provision of school bus transportation for children attending both public and nonpublic schools did not constitute aid to or an establishment of religion. In so holding, the Court, in an opinion by MR. JUSTICE BLACK, clearly set forth the purpose and intent of the Establishment Clause, stating (pp. 15-16):

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from

church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That decision did not declare to be prohibited general public programs not intended or directed to the aid of religion which, by the fact that they incidentally aid adherents to a particular religion or to all religions, also incidentally or collaterally aid the religion.

Of greatest importance in demonstrating the substantiality of the question here involved are the decisions of this Court in *Lemon v. Kurtzman*, *supra*, and *Tilton v. Richardson*, *supra*, as the latest examination by the Court of questions under the First Amendment. An analysis of those decisions clearly shows that the program enacted by Chapter 138 is not prohibited under the decisions of this Court and is, in fact, a valid, constitutional program of the State and that the question here raised is, thus, substantial and should be considered by the Court.

In the *Lemon* case, this Court was confronted with two statutes, one of which provided a subsidy for the payment of teachers' salaries in nonpublic schools and the other provided compensation for the teaching of certain secular subjects in nonpublic schools. In *Tilton*, the Federal Higher Education Facilities Act, providing for the construction of college academic buildings, was involved.

Examining the statutes in those cases, this Court observed in *Lemon* (612):

"Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation [between constitutionality and unconstitutionality] in this extraordinarily sensitive area of constitutional law."

and again (614):

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

In *Tilton*, the Court repeated the statement first above quoted as applicable to that case as well (678).

The tests of constitutionality were stated in *Lemon* as being (612-613):

"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

* * *

"* * * Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz*, *supra*, at 674."

In *Tilton*, this Court also said (679):

"The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In applying those tests, the Court observed in *Lemon* (615):

"In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

In the instant case, while the character and purposes of the institutions benefited may be the same as those in *Lemon*, the nature of the aid provided and the resultant relationship between government and religion are vastly different.

This Court in the *Tilton* and *Lemon* cases recognized that the State has certain legitimate concerns which establish a legitimate area of contact with sectarian schools, and that certain types of aid are by their nature constitutional even though they may provide some indirect benefit to the sectarian mission of the schools. In that regard, the Court said in *Lemon* (613):

"A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."

and again (614):

"Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts."

In that regard, it should be noted that Chapter 138 is directed, in part, to assuring compliance with the compulsory school attendance laws of the State.

Further, in *Lemon*, this Court also observed (616-617):

"Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

In the instant case, defendants contend that the aid involved is secular, neutral and non-ideological. It compensates the schools for record keeping required by the State in enforcing the compulsory attendance laws and statutes and regulations requiring minimum course standards and for the administration of State required tests. Those tests are designed by the State and are the same tests provided by the State to public as well as nonpublic schools and thus are both secular and non-ideological in nature.

The statute here in question does not involve the State in the actual educational process of the private schools. It does no more than compensate the private schools, sectarian and nonsectarian alike, for the expense of record keeping and administration of examinations necessary to assure that those schools are maintaining that quality of secular education necessary for the young people of the State.

It is necessarily a secular purpose and intent to see that children attending nonpublic schools comply with the compulsory attendance laws of the State, that they are receiving an adequate education from qualified teachers, and that they are tested in accordance with State standards of academic achievement.

The issues here raised and the statute here involved have not been considered by this Court in any prior decision.

The question of a State's ability to reimburse schools for the cost of mandated services to the State is substantial, both in terms of the extent of the State's ability to require such services and of the ability of the schools to provide such services, as well as in terms of the right to reimburse the schools for all or a part of the cost of those services.

CONCLUSION

Appellants respectfully pray that this Court note probable jurisdiction in this cause and place the case upon its calendar for argument.

Dated: August 16, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
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of Counsel

APPENDIX "A"

Majority Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION and
RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New
York, and EWALD B. NYQUIST, as Commissioner
of Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany, New York, ST.
AMBROSE SCHOOL, Rochester, New York, BISHOP
LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn,
New York, BAIS YAAKOV ACADEMY FOR GIRLS,
Richmond Hill, New York, and YESHIVAH RAMBAM,
Brooklyn, New York,

Intervenor-Defendants.

70 Civ. 3251.

Before: Hays, *Circuit Judge*, Palmieri and Lasker,
District Judges.

Appearances:

Leo Pfeffer, 15 East 84th Street, New York, N. Y. 10028,
Attorney for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of
New York, Capitol, Albany, New York, Attorney for De-
fendants Levitt and Nyquist. Of counsel: Ruth Kessler
Toch, Solicitor General and Jean M. Coon, Assistant
Solicitor General.

Appendix "A"—Majority Opinion

Davis, Polk & Wardwell, 1 Chase Manhattan Plaza, New York, N. Y. 10005, Attorneys for Intervenor-Defendants Cathedral Academy, St. Ambrose School, and Bishop Loughlin Memorial High School. Of counsel: Porter R. Chandler, Richard E. Nolan and James W. B. Benkard.

Julius Berman and Marcel Weber, New York, New York Attorneys for Intervenor-Defendants, Bais Yaakov Academy for Girls and Yeshivah Rambam.

LASKER, D. J.

We are called upon to determine the constitutionality of Chapter 138 of New York State's laws of 1970, which appropriates \$28,000,000 to be paid to nonpublic schools for expenses incurred in complying with requirements of state law of which the principal are the testing of pupils and maintenance of attendance and health records.¹

In 1970 there were 850,000 students nonpublic schools in New York. Chapter 138 includes the following legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

¹ The appropriation is to be paid to nonpublic schools "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Chap. 138 of the Laws of 1970).

Appendix "A"—Majority Opinion

"That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

"That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs."

Plaintiffs are taxpayers of New York and an unincorporated association whose members are New York residents whose objectives include opposition to use of public funds for the support of sectarian or religious schools. Defendants are the Commissioner of Education, who administers the statute, and the State Comptroller, who makes payment of the appropriated funds. Intervenors are Catholic and Jewish parochial schools who are beneficiaries of the Act.

The record contains defendants' and intervenors' answers to plaintiffs' interrogatories. No factual disputes exist.

Plaintiffs sue to enjoin the enforcement of the statute. Defendants move for judgment, claiming that the statute violates neither the federal nor the state constitution, and to dismiss the complaint on the ground that it raises a threshold question of violation of the constitution of the State of New York.

I.

The statute, which became effective July 1, 1970, directs the Commissioner of Education to apportion annually

Appendix "A"—Majority Opinion

to nonpublic schools the sum of \$27 for each pupil in average daily attendance in the first six grades and \$45 for those in grades seven through twelve. The express purpose of the expenditure, as indicated above, is to compensate the schools for services "mandated" by state law or regulation of the Commissioner. These services include administration of compulsory attendance laws, Regents' examinations, and pupil evaluation program tests, as well as preparation of various reports intended to assure that minimum state educational standards are met. The services rendered are required of public and nonpublic schools alike.

The Act is construed and applied by the defendants to include as permissible beneficiaries school which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7).²

² It should be pointed out that intervenors Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on admissions or require attendance of pupils at religious activities or obedience by students to the doctrine of a particular faith; that the schools contribute to the religious mission of the sponsoring church, but they do not impose religious restrictions on faculty appointments and they place restrictions on teaching only to the extent that it not be contrary to the tenets of the sponsoring church. (Intervenors' Answers to Interrogatory 3.)

Appendix "A"—Majority Opinion

The beneficiary schools are required neither to account for nor return to the state any amounts received by them in excess of their actual expenditures for "mandated services." (Answers to Interrogatories 4, 7 and 11). This, of course, leaves a school free to expend any excess for whatever purpose it wishes, including religious or sectarian objectives.

Since the statute is predicated—and its constitutionality allegedly justified—on the ground that it merely reimburses the nonpublic schools for expenses of state-mandated services, post-enactment studies have been conducted comparing the actual cost to the schools of performing services with the amounts allocated to them by the state. The conclusions to be drawn from such reports (Exhibit D to Defendant Nyquist's Answers to Plaintiffs' Interrogatories) are cloudy. If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses. Doubt as to which standard is properly applied is occasioned by material submitted by the Commissioner to the Board of Regents at its request which states (Exhibit G to Defendant Nyquist's Answers to Interrogatories, at p. ES 1.9):

" . . . only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated*. Inclusion of such costs only would reduce the examination figure [of \$68,853] by \$66,629." (Emphasis in original).

Appendix "A"—Majority Opinion

While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or indeed, whether they can be regarded as specifically "mandated."

Plaintiffs contend that on its face, and as applied, the statute violates the establishment clause of the First Amendment to the federal constitution, as well as Article 11, section 3, of the New York constitution, because its purpose and primary effect is to advance religion and it gives rise to excessive governmental involvement and entanglement in religion.³

Defendants and intervenors argue that the statute is constitutionally justified since payments are made solely as reimbursement for the expenses of furnishing secular services mandated by the state. They contend that the Act constitutes neither sponsorship, financial support, nor active involvement in religious activity by the state and does not cause excessive entanglement of church and state. They also claim that, aside from the merits, the complaint should be dismissed for "lack of jurisdiction"⁴ because the

³ Plaintiffs also allege that the statute constitutes compulsory taxation in aid of religion in violation of the free exercise clause of the First Amendment. In view of that rationale by which we dispose of the case, it is unnecessary to consider this argument.

⁴ Defendants state the position in their brief as follows:

"The complaint should be dismissed on the ground that the Court lacks jurisdiction over the subject matter of the action in that the complaint raises a threshold question of the constitutionality of the statute under the provisions of the constitution of the State of New York."

We assume that defendants wish us to apply the doctrine of abstention, since it is clear that the Court has jurisdiction of the First Amendment issue.

Appendix "A"—Majority Opinion

complaint raises a threshold question under the constitution of New York. This contention was exhaustively treated and rejected by the convening judge (*Committee for Public Education and Religious Liberty, et al., v. Rockefeller, et al.*, 322 F.Supp. 678, 687 (S.D.N.Y. 1971)). We agree with his view that neither abstention nor dismissal for the reason suggested is appropriate here. The federal and state issues are of equal importance. The statute is unambiguous on its face, and under the rule of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the court should "proceed to the federal constitutional claim." Furthermore, abstention is particularly unsuitable in this case because, as indicated in the convening judge's opinion (322 F.Supp. at 688), plaintiffs have no standing under New York law to litigate the state constitutional question in the New York courts. We are unimpressed by the proposal in the states' brief that we should abstain because "there is no assurance that that Court [i.e., Court of Appeals of New York] would not now reverse the position that it took in earlier cases . . ." in the light of the holding in *Flast v. Cohen*, 392 U.S. 83 (1967), that a federal taxpayer has standing to sue for constitutional violations. Nothing in the New York Court of Appeals' decisions since *Flast* encourages or supports the state's argument on this point.

II.

We come to the federal constitutional question. We are guided so clearly by the decision of the Supreme Court last term in *Lemon v. Kurtzman* and *Earley v. DeCenso*, 403 U.S. 602 (1971), that we need not review at length earlier cases which articulated constitutional limits on govern-

Appendix "A"—Majority Opinion

mental assistance to church-supported schools. The boundaries of permissible government action in the field were set by *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968). In *Everson*, the Court upheld a New Jersey statute which reimbursed *parents* for bus fares of children attending parochial schools. However, the *Everson* Court cautioned that its decision carried to "the verge" of what Chief Justice BURGER, in *Lemon*, described as the "forbidden territory under the Religion Clauses." In *Allen*, the Court found that a New York law under which the state loaned school books to *students* at parochial schools passed constitutional muster. Neither case involved a statute which, as here, grants direct subsidies to parochial schools; and in *Lemon* the Court struck down two such plans.

The *Lemon-Earley* decision dealt with Pennsylvania and Rhode Island statutes which, as here, provided for cash payments intended to assist parochial schools in the acknowledgedly grave financial crisis which faces them. The Rhode Island statute, resting on a legislative finding that the quality of education available in nonpublic schools was jeopardized by rising salaries needed to attract teachers, authorized state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by direct limited payment to the teacher. The teacher was bound to teach only subjects and use only teaching materials offered in public schools, and not to teach any course in religion. Eligible schools were required to submit to the state financial data necessary to determine the propriety of payments under the Act. The Pennsylvania statute, also based on a legislative finding of rapidly

Appendix "A"—Majority Opinion

rising costs in the state's nonpublic schools, authorized the Superintendent of Public Instruction to "purchase" "secular educational services" from nonpublic schools. The purchase was consummated by state reimbursement to nonpublic schools of actual expenses for teachers' salaries, text books and materials. To secure reimbursement, a school was required to follow specified accounting procedures subject to state audit. Reimbursement was limited to such secular courses as mathematics, foreign languages, physical science, and physical education, and prohibited courses that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

From this analysis it is apparent that the New York statute before us more closely resembles the Pennsylvania than the Rhode Island statute, and our decision is guided by the Supreme Court's observations as to the former. Indeed, the sole differences of substance which exist between the Pennsylvania statute and New York's mandated services law are that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing; and under the Pennsylvania statute a school was required, subject to audit, to account to the state, while here the school is not. We find these distinctions insufficient to avoid the rule of *Lemon-Earley*, concluding, as did the *Lemon* Court, "that the cumulative impact of the entire relationship arising under the statute[s] . . . involves excessive entanglement between government and religion."

The *Lemon* Court's finding of excessive entanglement was based on an examination of the "character and pur-

Appendix "A"—Majority Opinion

poses of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon, supra*, at 615.

In the case at hand there is no question as to the character and purposes of the institutions which are benefited. No dispute exists as to the close association of the schools to the religious institutions of various faiths which support them. Indeed, the record establishes that payments are made to schools which, for example, impose religious restrictions on admissions, require attendance of pupils at religious activities, and are an integral part of the religious mission of the supporting church.

The nature of the aid provided here is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Even before its holding in *Lemon* that such payments violated the establishment clause, the Court had cautioned in *Walz v. Tax Commission*, 397 U. S. 664, 675 (1970):

"Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."

The defendants here contend that the rationals of *Lemon*, *Earley* and the quoted *Walz* passage are inapplicable to the New York statute, which does not require, either on its face or as administered, any "detailed administrative relationship for enforcement" of the statute. It is said that, since the New York law simply does not require benefi-

Appendix "A"—Majority Opinion

aries to report on their use of the funds, the vice foreseen in *Walz* and found fatal in *Lemon* does not exist here.

The argument is unpersuasive. As the *Lemon* Court commented:

"The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." (at 621).

We think this lesson of history is applicable here. Indeed, the gentle inquiry of the Board of Regents which caused studies to be made to determine whether the costs to the nonpublic schools for mandated services are actually as great as the amounts they receive from the state is a sort of inching in that direction. It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Indeed, section 8 of the statute itself states: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." It is difficult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now.

Appendix "A"—Majority Opinion

to keep their shares of the apportioned money regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. The dilemma we have outlined is insoluble. Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Defendants argue that the strictures of *Lemon* and *Walz* against cash payments do not apply here because reimbursement is being made for services which are "secular, neutral, or nonideological" (*Lemon*, at 616) analogous to the payments which were approved in *Everson* and *Allen*. The analogy, however, is inapposite. Bus transportation, school lunches, public health services, and secular text books (for which payment was approved in *Everson*, *Allen* and other cases) are of a character entirely different from services rendered by teachers in administering tests not only developed by the state, but those developed by the schools or the teachers. By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon*, "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* and *Allen* inapplicable. Nor does the fact that the reimbursement by New York is for "mandated services" rescue the statute. It is true, of course, that administration of tests, recording attendance of students, and compiling health records are required by the state, but so is

Appendix "A"—Majority Opinion

teaching required by the state if a private school, parochial or otherwise, is to be certified as an adequate substitute for public school. It would be fanciful to suggest, however, that the state would be free to reimburse the schools for ordinary teaching expenses on the theory that the state "mandates" such services.

Even if all these observations were not true, the statute would nevertheless be constitutionally flawed. As the *Lemon-Earley* Court stated:

"A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." (at 622).

The Court held there that in a community with a large number of pupils served by church-related schools (surely true in the present case) it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation. The Court concluded (at 622) that "... political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Measured by this standard, the New York statute suffers precisely the same constitutional defects as both the Pennsylvania and Rhode Island statutes in *Lemon-Earley*.

While we thus conclude that Chapter 138 violates the establishment clause of the First Amendment, it is proper for us to note our sympathetic awareness of the serious financial problems directly facing the parochial schools and, indirectly, the public. We recognize and appreciate the contribution which private schools have made financially and in providing that variety of approach to educa-

Appendix "A"—Majority Opinion

tion which enriches community life. But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star.

A permanent injunction against the enforcement of the statute will be granted. The defendants' motions are denied.

Submit order on notice.

Dated: New York, New York, April 27, 1972.

RICHARD R. HAYS, *C. J.*,

MORRIS E. LASKER, *D. J.*

APPENDIX "B"

Dissenting Opinion of PALMIERI, D. J.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, et al.,**

Plaintiffs,

against

**ARTHUR LEVITT, as Comptroller of the State of New
York, and EWALD B. NYQUIST, as Commissioner
of Education of the State of New York,**

Defendants.

and

**CATHEDRAL ACADEMY, Albany, New York, ST. AM-
BROSE SCHOOL, Rochester, New York, BISHOP
LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn,
New York, BAIS YAAKOV ACADEMY FOR GIRLS,
Richmond Hill, New York; and YESHIVAH RAM-
BAM, Brooklyn, New York,**

Intervenor-Defendants.

70 Civ. 3251.

**Before HAYS, Circuit Judge, PALMIERI and LASKER, Dis-
trict Judges.**

Appendix "B"—Dissenting Opinion

PALMIERI, J.

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.⁽¹⁾ It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those

⁽¹⁾ This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

Appendix "B"—Dissenting Opinion

who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U. S. 672, 678 (1971), that

"candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication".

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U. S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U. S. 236 (1968), and *Cochran v. Louisiana State Board of Education*, 281 U. S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U. S. 644 (1970).⁽²⁾ If, as the Supreme Court pointed

⁽²⁾ This language is borrowed substantially from *P. O. A. U. v. Essex*, 28 Ohio State 2d 79 (1971).

Appendix "B"—Dissenting Opinion

out in *Allen, supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U. S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular neutral, or nonideological services, facilities, or materials."

Accepting, as I believe we must, the basic promise that no perfect or absolute separation between religion and government is really possible, see *Walz v. Tax Commission of the City of New York, supra*, at 670, I agree partly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State v. Oakey* (D. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

Appendix "B"—Dissenting Opinion

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

EDMUND L. PALMIERI,
U. S. D. J.

Dated: April 27, 1972.

APPENDIX "C"
Order and Judgment

IN THE
 UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York and EDWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants.

70 Civ. 3251.

U. S. District Court
 Filed
 Jun 1 1972
 S. D. of N. Y.

This action having come on to be heard on the merits before the Court, the Honorable PAUL R. HAYS, Circuit Judge, the Honorable EDMUND L. PALMIERI and the Honorable MORRIS E. LASKER, District Judges for the Southern

Appendix "C"—Final Judgment Appealed From

District of New York, and after hearing arguments of counsel, the Court having rendered an opinion dated April 27, 1972, it is hereby

ORDERED AND ADJUDGED

1. That the defendants' motion to dismiss the complaint is denied.

2. Chapter 138 of the Laws of the State of New York of 1970 is hereby declared to be unconstitutional in violation of the First Amendment of the United States Constitution.

3. The defendants and their agents and all persons acting for or on behalf of the State of New York are permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

4. The order and judgment of the Court filed on the 19th day of May, 1972, is hereby vacated.

Dated: New York, New York, June 1, 1972

PAUL R. HAYS
Circuit Judge

MORRIS E. LASKER
District Judge

Judgment entered 6/1/72.

JOHN LIVINGSTON

APPENDIX "D"

Notice of Appeal to the Supreme Court of
the United States

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York and EDWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hills, New York, and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenors-Defendants.

70 Civ. 3251.

Notice is hereby given that Arthur Levitt, as Comptroller of the State of New York, and Ewald M. Nyquist, as Commissioner of Education of the State of New York, the de-

Appendix "D"—Notice of Appeal

fendants above-named, hereby appeal to the Supreme Court of the United States from the final order and judgment entered in this action on June 1, 1972, holding Chapter 138 of the New York Laws of 1970 unconstitutional as constituting an establishment of religion in violation of the First Amendment to the Constitution of the United States, and granting a permanent injunction restraining the payment of funds to nonpublic schools pursuant to that chapter, and defendants appeal from each and every part of said order.

This appeal is taken pursuant to 28 U. S. C. § 1253.

Dated: Albany, New York, June 7, 1972.

LOUIS J. LEFKOWITZ

Attorney General of the State
of New York

By JEAN M. COON

Assistant Solicitor General

Attorney for Defendants

Department of Law

The Capitol

Albany, New York 12224

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Appendix "D"—Notice of Appeal

To:

John Livingston, Clerk
United States District Court for the
Southern District of New York
Foley Square
New York, New York 10007

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APPENDIX "E"

Chapter 138

An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor.

Approved April 18, 1970, effective July 1, 1970.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Non public schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, exam-

*Appendix "E"—Chapter 138 of the New York
Laws of 1970*

ination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base

*Appendix "E"—Chapter 138 of the New York
Laws of 1970*

year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to main-

*Appendix "E"—Chapter 138 of the New York
Laws of 1970*

tain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a non-profit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid on or before March fifteenth of such year, and the second to consist of the balance and to be paid on or before May fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated

*Appendix "E"—Chapter 138 of the New York
Laws of 1970*

for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect July first, nineteen hundred seventy.

Supreme Court of the United States

October Term 1971

23-230

On the Petition of the United States of America for a writ of Habeas Corpus, and on the Answer of the Respondent, the State of Texas, and on the Motion of the Respondent for a writ of Habeas Corpus.

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THE HISTORY OF THE
CITY OF BOSTON

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

BY
JOSEPH NEALE, ESQ.
OF THE BARR

LONDON:
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IN TWO VOLUMES.

VOL. I.

THE HISTORY OF THE CITY OF BOSTON

AUG 18 1972

IN THE

Supreme Court of the United States

MICHAEL RODAK, JR., CL

OCTOBER TERM, 1972

No.

72-270

~~ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the
State of New York,~~

~~- and -~~

~~CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS
and YESHIVAH RAMBAM,~~

~~- and -~~

SENATOR EARL W. BRYDGES, as Majority Leader and President
Pro Tem of the New York State Senate,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
HOWARD M. SQUADRON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

**ON BEHALF OF APPELLANT,
SENATOR EARL W. BRYDGES**

August 16, 1972

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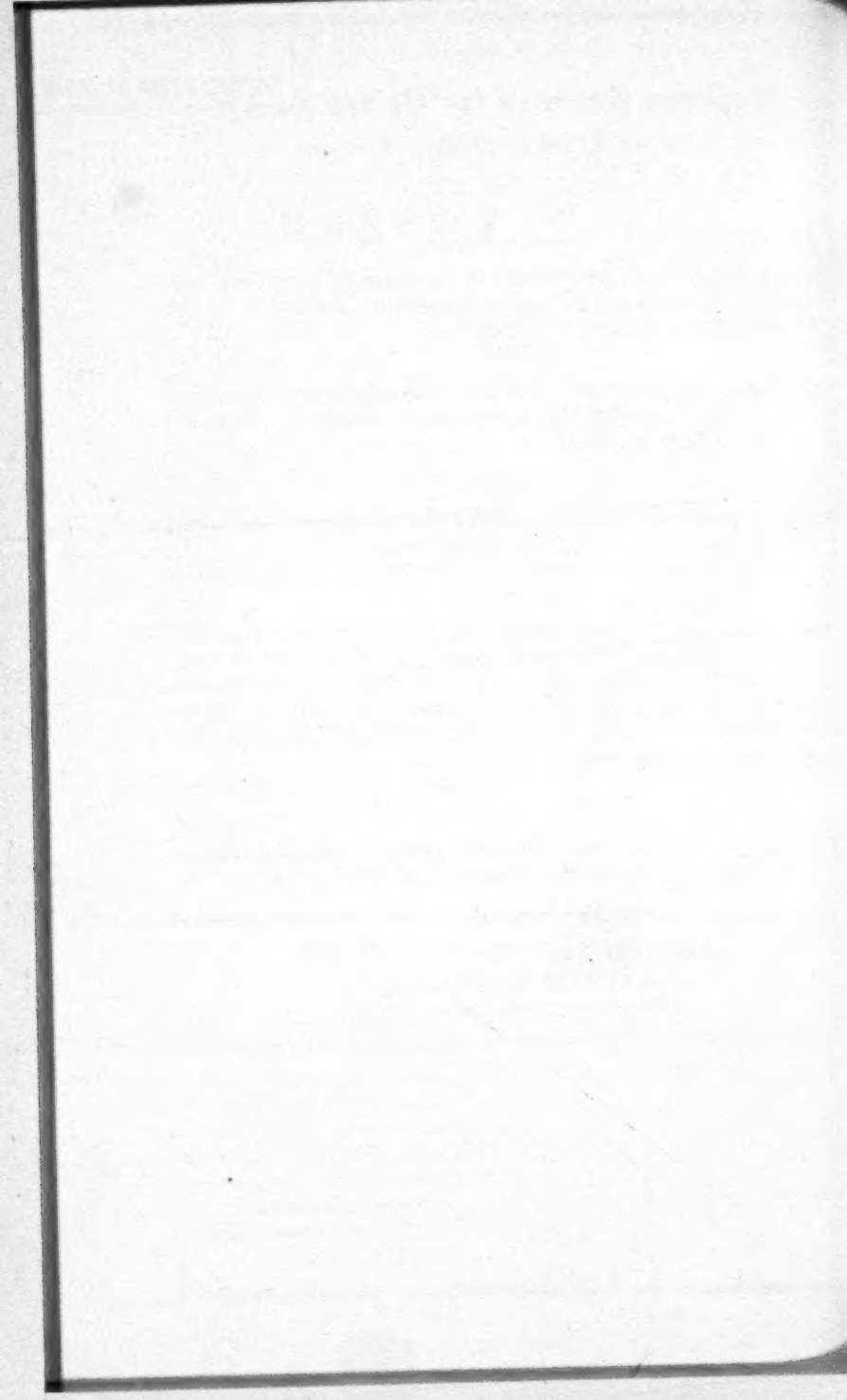


TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
The Questions Are Substantial	5
1. THE MANDATED SERVICES AID TO NON-PUBLIC SCHOOLS IS CLEARLY SECULAR, NEUTRAL AND NONIDEOLOGICAL WITHIN THE SUPREME COURT GUIDELINES OF <i>LEMON V. KURTZMAN</i>	5
2. THE MANDATED SERVICES ACT IS NECESSARY TO AVERT A FISCAL CRISIS IN FINANCING EDUCATIONAL AND OTHER GOVERNMENTAL SERVICES IN NEW YORK STATE..	7
3. LEGISLATIVE BODIES AND POLITICAL INSTITUTIONS SHOULD NOT BE CURTAILED IN THEIR CONSTITUTIONAL RIGHT TO A FREE AND OPEN DEBATE OF ISSUES TOUCHING ON RELIGION	11
Conclusion	14

	PAGE
Appendix	17
A. Opinion of the District Court for the Southern District of New York, dated April 27, 1972. (Majority and Minority Opinions)	18
B. Judgment of the District Court for the Southern District of New York, dated June 1, 1972	34
C. Chapter 138 of the 1970 Laws of New York	36
D. Notice of Appeal of Appellant, Senator Earl W. Brydges, filed July 14, 1972	40
E. Order of the District Court for the Southern District of New York, dated June 29, 1972, Denying Motion to Stay Injunction	43

TABLE OF CITATIONS

Cases

<i>Americans United for Separation of Church and State v. Oakey</i> , (D.C. Vt 1972), 339 F. Supp. 545	12
<i>Committee for PEARL, et al, v. Rockefeller, et al</i> , (D.C. N.Y. 1971), 322 F. Supp. 678	2
<i>Earley v. DiCenso</i> , 403 U.S. 602 (1971)	2
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) ..2, 6 and	11
<i>Lemon v. Sloan</i> , (D.C. Pa. 1972), 341 F. Supp. 1356	12
<i>Plessy v. Ferguson</i> , 1896	15
<i>Robinson v. DiCenso</i> , 403 U.S. 602 (1971)	2
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	2
<i>Wolman v. Essex</i> , U.S.D.C., SE Dist., Ohio (1972) ..	12

TABLE OF CONTENTS

iii

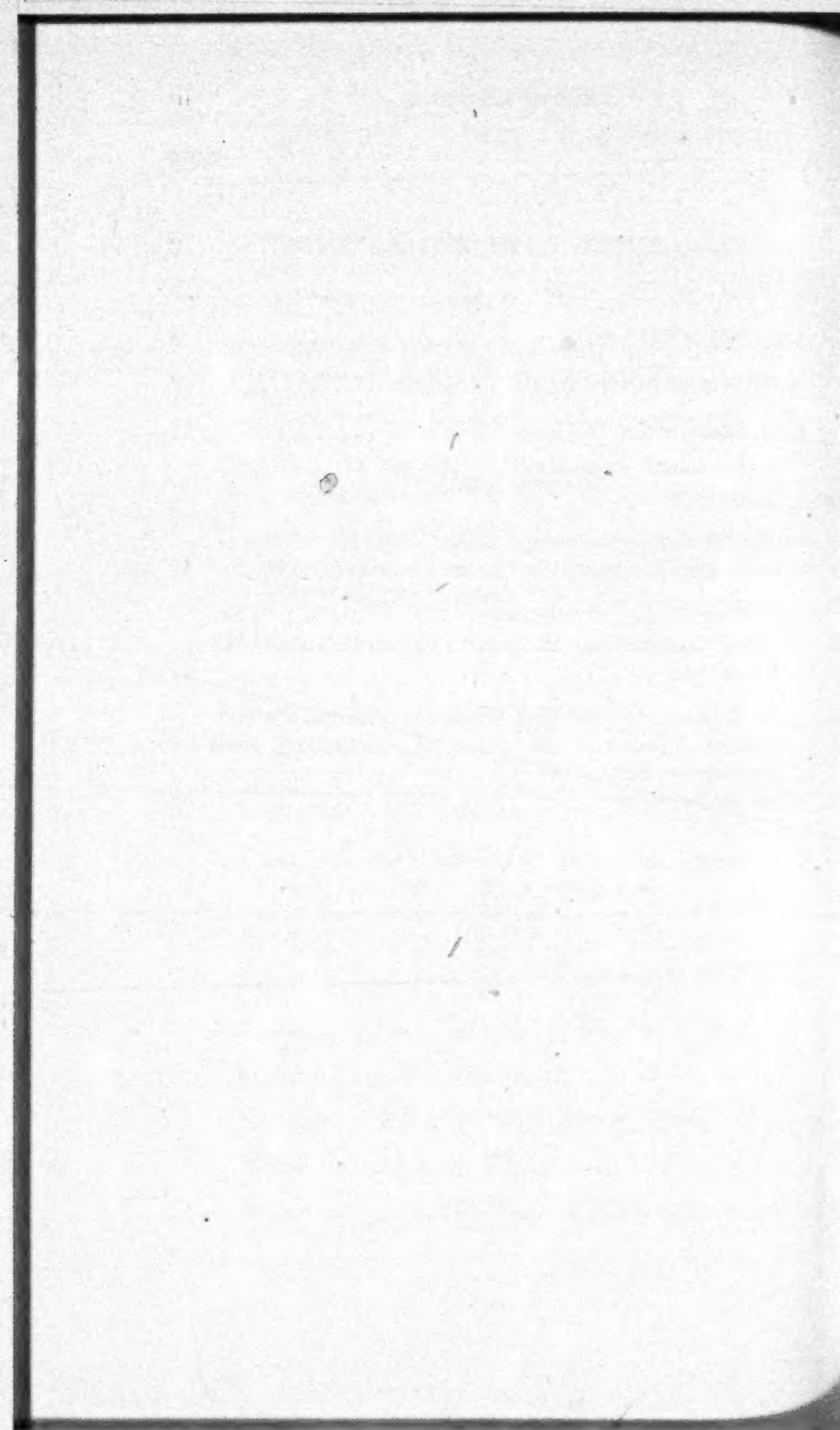
PAGE

Statutes

28 U.S.C. §§ 1331, 2281, 2283, 2201 and 2202	2
28 U.S.C. §§ 2281, 2284	3
28 U.S.C. § 2101 (b)	3
N.Y.S. Constitution Article XI Section 1	7
U.S. Constitution Articles IX and X	3, 14

Other Authorities

<i>Michigan Law Quadrangle Notes</i> , Vol. 15, "Government and Religion, the Search for Absolutes"	10
U.S. Gov. Print Office, Stock No. 1780-0972, The Final Report of the President's Panel on Nonpublic Education	14
1972 Report of New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, Chapter V—Aid to Non-public Schools	8



IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No.

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the
State of New York,

– and –

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS
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– and –

SENATOR EARL W. BRYDGES, as Majority Leader and President
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HOWARD M. SQUADRON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

ON BEHALF OF APPELLANT,
SENATOR EARL W. BRYDGES

Appellant, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, appeals from the judgment of the United States District Court for the Southern District of New York, entered on June 1, 1972, permanently enjoining payments under a 1970 law of New York State to nonpublic schools, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the District Court for the Southern District of New York, on the motion to convene a three-judge District Court is reported in 322 F. Supp. 678 (1971).

The majority opinion of the District Court enjoining payments under the 1970 law of New York State and the dissenting opinion thereto are not yet officially reported. They are attached hereto as Appendix A.

Jurisdiction

This suit was brought under 28 U.S.C. §§1331, 2281, 2283, 2201 and 2202 for a permanent injunction against the allocation of funds of the State of New York to nonpublic schools to reimburse them for a portion of expenses for complying with State-mandated attendance, reporting and educational requirements. The judgment of the District Court was entered on June 1, 1972, (Appendix B hereto), and notice of appeal of Senator Earl W. Brydges, an intervenor-defendant in this action, was filed in this Court on July 14, 1972 (Appendix D hereto). The following most recent decisions sustain the jurisdiction of the Supreme Court to review judgment on direct appeal in this case: *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

Questions Presented

1. Is there a violation of the First Amendment provisions of the U.S. Constitution, with respect to "Separation of Church and State", when a state statute grants limited state funds to nonpublic schools to alleviate part of the additional financial burden imposed on them by their compliance with certain state educational requirements mandating record-keeping, examination and inspection of students attending nonpublic schools?

2. Does the "Establishment Clause" of the First Amendment of the U.S. Constitution, with respect to prohibiting laws establishing religion, stifle the will of democratic institutions

to provide minimal assistance to nonpublic schools of a secular, nonideological and neutral nature?

3. Is there a violation of the First Amendment provisions of the U.S. Constitution, with respect to Freedom of Speech, and of Articles IX and X of the U.S. Constitution, with respect to the sovereignty of the individual and of the several states, when the federal judiciary curtails the rights of legislative bodies and political institutions to a free and open debate of issues touching on religion?

Statutes Involved

Chapter 138 of the 1970 Laws of the State of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor," which is set forth in Appendix C hereto.

Statement

Appellant Senator Earl W. Brydges is the Majority Leader and President Pro Tem of the New York State Senate.

Appellants Levitt and Nyquist are, respectively, Comptroller and Commissioner of Education of the State of New York. Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam are nonpublic elementary and/or secondary schools situated in the State of New York.

Appellees, allegedly taxpayers of New York State, instituted this suit on July 30, 1970 in the United States District Court for the Southern District of New York, praying, *inter alia*, that appellants Levitt and Nyquist be permanently enjoined from approving or paying any funds of the State of New York pursuant to Chapter 138 of the 1970 Laws of New York (Appendix C hereto, hereinafter referred to as "Mandated Services Act") to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith. Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais

Yaakov Academy for Girls and Yeshivah Rambam, as beneficiaries under the Mandated Services Act, duly intervened in the suit as parties defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure (FRCivP). A three-judge District Court consisting of the Hon. Paul R. Hays, U.S. Circuit Judge, Hon. Edmund L. Palmieri and Hon. Morris E. Lasker, U.S. District Judges, was duly constituted on February 24, 1971 pursuant to 28 U.S.C. §§2281, 2284. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion (Appendix A hereto), concurred in by Judge Hays, that the Mandated Services Act "violates the establishment clause of the First Amendment." The Court reasoned, in part, as follows:

Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Judge Palmieri dissented (Appendix A hereto) on the ground, among others, that

(t) he record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions.

On June 1, 1972, judgment was entered (Appendix B hereto) permanently enjoining the

defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

Notices of appeal from the foregoing judgment to this Court have been duly filed pursuant to 28 U.S.C. §2101 (b) on be-

half of all appellants, including your appellant Senator Earl W. Brydges, (Appendix D hereto), who was permitted to intervene as a party defendant in the suit pursuant to Rule 24, FRCivP subsequent to entry of judgment.

On June 20, 1972, the three-judge District Court reconvened to hear in open court the motion of appellants Levitt, Nyquist, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School and Senator Earl W. Brydges to suspend its injunction pursuant to Rule 62 (c), FRCivP pending appeal to this Court. After hearing all of the parties, Judge Palmieri stated orally from the bench that he would grant the motion. Judge Hays stated that he would deny the motion and leave it to this Court to determine whether a stay should be granted. Judge Lasker reserved his decision for a week. On June 28, 1972, Judge Lasker indicated that he had decided to deny the motion, whereupon Judge Hays and he signed an Order on June 29th denying appellants' motion, (Appendix E hereto).

An application by appellants to the Supreme Court, for a stay of the District Court's judgment pending a hearing and determination of the appeal, pursuant to Rule 18 of the Rules of the Supreme Court, was denied on July 17, 1972.

The Questions Are Substantial

1. THE MANDATED SERVICES AID TO NONPUBLIC SCHOOLS INVOLVES A CASE OF FIRST IMPRESSION AND IS CLEARLY AID WHICH IS "SECULAR, NEUTRAL AND NONIDEOLOGICAL" WITHIN THE SUPREME COURT GUIDELINES OF *LEMON V. KURTZMAN*.

The Mandated Services Act is unique in that it is different from any other statute in the United States. It provides reimbursement to nonpublic schools for the considerable expenses they incur in complying with the comprehensive laws and regulations of the State of New York relating to record-keeping and the examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enroll-

ment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports.

There is no decision of this Court or of any other court controlling the issues of law and fact raised in the District Court and now raised on appeal. The clearest indication of this is the incisive dissenting opinion of Judge Palmieri (Appendix A hereto).

The majority opinion of the District Court relies primarily on the decision of this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But that decision dealt specifically with a Pennsylvania enactment providing for that state's payment of parochial schoolteachers for teaching mathematics, modern foreign languages, physical science and physical education and a Rhode Island statute providing for the payment by that state of salary supplements to parochial schoolteachers in the amount of 15 percent of their salaries. Clearly, neither law examined in *Lemon v. Kurtzman* had anything to do with the neutral, non-ideological services required of, and provided by, all schools, public and nonpublic alike, and which are within the purview of the Mandated Services Act. Indeed, this Court took specific note of the fact in *Lemon v. Kurtzman* that its . . . "decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

This Court's decision in *Lemon v. Kurtzman* was limited to the "narrow" question before it at the time, whether public aid for the salaries of teachers in nonpublic schools involves "excessive entanglement" by public agencies in religion. This Court quite naturally observed in that case that efforts on the part of public officials to determine what portion of a teacher's salary was attributable to instruction in secular courses, as opposed to religious dogma, would result in "excessive entanglement" in religious matters. No such "entanglement" arises, however,

under the administrative procedures for making payments to nonpublic schools for "mandated services" aid under the provisions of Chapter 138 of the New York State Laws of 1970. The aid under the 1970 enactment is limited solely to partial reimbursement to the nonpublic schools for the expenses actually incurred to insure that the state's mandatory attendance requirements and minimum nonideological scholastic achievements are maintained in the nonpublic schools. In no respect are such expenses intended to reimburse such schools for teaching nonpublic school children. Instead, reimbursement is limited solely to costs of "secular, neutral and nonideological" services, mandated by New York State and of a nature which this Court recognized in the *Lemon* case as constitutional.

2. THE MANDATED SERVICES ACT IS NECESSARY TO AVERT A FISCAL CRISIS IN FINANCING EDUCATION AND OTHER GOVERNMENTAL SERVICES IN NEW YORK STATE.

During the 1970-71-72 legislative sessions, the New York State Legislature devoted particular attention to a matter of vital importance to every citizen in the State of New York—how to finance a quality education for every child in the State.

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for "... the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about \$2.5 billion in 1972-73, an increase of almost \$500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated, nonpublic schools at practically no cost to the taxpayer. Greatly increased

costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels, including education, threaten a precipitous collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often characterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that would be available to support an influx of nonpublic students into the public schools.

**PROPERTY TAX REVENUE REMAINING
UNDER CONSTITUTIONAL LIMITS FOR THE SUPPORT
OF EDUCATION IN SELECTED CITIES***

City	1971-72 Property Tax Margin Remaining	1970-71 Nonpublic Enrollment	Amount available per pupil at local level if all nonpublic pupils were transferred to public schools
Auburn	\$ 254,122	1,709	\$148.69
Binghamton	175,826	2,505	70.19
Buffalo	5,528,877	32,353	170.89
Jamestown	36,826	535	68.83
New York	1,400,187	399,615	3.50
Niagara Falls	1,118	3,430	.32
Rochester	2,835,858	14,986	189.23
Syracuse	3,798	9,640	.39
Troy	896,628	3,325	269.66
Utica	664,116	5,402	122.93
Yonkers	-0-	9,946	-0-

* Table and informational data in this subdivision 2 are derived from 1972 Report of New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, Chapter V—Aid to Nonpublic Schools.

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of \$750 per pupil) would be well-nigh impossible if these students should transfer in any substantial numbers. In fact, the Table demonstrates that even a small number of transfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately \$1400 per year. Indeed we could argue that the magnitude of that expenditure—the highest in the nation—was made possible only by the willingness of the parents of nonpublic school children to bear an enormous tuition burden for the education of almost 750,000 children in addition to their normal tax load. Of course, the presumption here is that tax dollars are limited; and thus, the fewer the pupils, the more that can be spent on a per pupil basis for public education. This presumption is real and the financial crises that would be precipitated by attempting to maintain the present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over \$1 billion additional annual operating cost that would be necessary, and the estimated \$1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children.

The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is \$600,000,000 more than the entire revenue currently generated by the State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its current budget on *anticipated* Federal revenue sharing of \$400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer is obvious. Survival of quality education is at stake.

No one will deny New York's constitutional authority to mandate certain minimal services, tests, record-keeping, health services, attendance requirements and the like in the nonpublic schools within its borders. It has done so for many years without challenge and without cost to the taxpayer. In recent years, due to inflation, labor costs and the overall increased costs of producing quality educational services in the nonpublic schools, these schools were no longer able to financially comply with the additional costs of providing for the State the required reporting and record-keeping of these mandated services. Because of this increased financial burden imposed by the State, many nonpublic schools had begun to reach the breaking point and were about to be forced to close their doors.

The Legislature, recognizing the impending calamity it was faced with, had the choices of either letting the nonpublic schools close, or eliminating the programs of mandated services, or assisting the nonpublic schools financially for their out-of-pocket expenses incurred in complying with these State mandates. The Legislature chose the latter course.

It seems anomalous to say that the Legislature can direct these private nonpublic schools to perform certain services for the State but not be able, constitutionally, to reimburse them partially for the costs of performing these services. Yet that is the substance of the decision below. Indeed, it would appear to be more of a constitutional deprivation for the State to mandate these services by private institutions without just compensation rather than for the State to reimburse them for these services.

This Court would do well to heed the advice of Professor Paul Kauper, an eminent constitutional lawyer, who concluded his lecture on "Government and Religion, the Search for Absolutes" (published in *Michigan Law Quadrangle Notes*, Vol. 15), as follows:

"In short, the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom in these matters; that there is latitude for some play in the joints; and that in the area of church-state relations as in all other areas of public concern where policy considera-

tions loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process."

Perhaps, the time has arrived for the resuscitation of the doctrine of "judicial self-restraint" in this area of the law, in order to leave room for states to experiment with devising more effective methods of educational achievement which is more apt to arise through competition between schools rather than by elimination of the nonpublic schools from the scene.

3. LEGISLATIVE BODIES AND POLITICAL INSTITUTIONS SHOULD NOT BE CURTAILED IN THEIR CONSTITUTIONAL RIGHT TO A FREE AND OPEN DEBATE OF ISSUES TOUCHING ON RELIGION.

The exercise of such fundamental rights as Freedom of Speech, and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue no matter how politically divisive it may be on segments of our society.

The exercise of this right appears to have been curtailed by recent federal court decisions involving issues similar to those in this lawsuit. Those decisions have expressly, and by innuendo, curtailed the rights of state legislative bodies to freely and openly debate issues which are "potentially divisive." The basis of these federal court decisions is the opinion of this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In that case the Court observed that:

"Ordinarily, political debate and division, however vigorous or even partisan, are normal manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

"The potential divisiveness of such conflict is a threat to the normal political process."

This Court issued this pronouncement in declaring unconstitutional a Pennsylvania law providing public funds for teaching nonreligious courses in private schools. In so ruling the Court acknowledged its chief concern was not whether the law aided religion, but that it involved "excessive entanglement" of religion in government. This entanglement, the Court concluded, violated the First Amendment provision of separation of church and state. The Court implied that this excessive entanglement exists in the normal political activity of our legislative bodies when considering issues which peripherally touch upon a religious question.

This Court's reaction to entanglement of religion and government cannot be taken as a "passing fancy." In recent months other Federal courts have relied upon the pronouncement in the *Lemon* case to curtail efforts by various legislative bodies throughout the country to seek solutions to the fiscal plight of nonpublic schools.

For example, in March of this year a three-judge Federal Court declared unconstitutional a Vermont law which partially reimbursed public school teachers for teaching nonreligious courses in parochial schools. (*Americans United for Separation of Church and State v. Oakey*, (D.C. Vt. 1972), 339 F. Supp. 545). The court noted (at 545):

"Any such involvement carries with it the explosive potential for citizen friction and political sub-division along religious lines."

Similar restrictions on the freedom of state legislatures to debate issues involving religious overtones was evidenced in the month of March of this year when federal courts sitting in Pennsylvania and Ohio struck down laws reimbursing parents for children's tuition payments in private schools. (See *Lemon v. Sloan*, (D.C. Pa. 1972), 341 F. Supp. 1356; *Wolman v. Essex*, U.S.D.C., SE Dist., Ohio (1972)). Particularly significant is the decision of the federal court in Ohio, which states, in part, that the plan

"... contains the seeds for increased political involvement along religious lines at every level of government.

*Appendix A***I.**

The statute, which became effective July 1, 1970, directs the Commissioner of Education to apportion annually to non-public schools the sum of \$27 for each pupil in average daily attendance in the first six grades and \$45 for those in grades seven through twelve. The express purpose of the expenditure, as indicated above, is to compensate the schools for services "mandated" by state law or regulation of the Commissioner. These services include administration of compulsory attendance laws, Regents' examinations, and pupil evaluation program tests, as well as preparation of various reports intended to assure that minimum state educational standards are met. The services rendered are required of public and nonpublic schools alike.

The Act is construed and applied by the defendants to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7).²

The beneficiary schools are required neither to account for nor return to the state any amounts received by them in excess

² It should be pointed out that intervenors Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on admissions or require attendance of pupils at religious activities or obedience by students to the doctrine of a particular faith; that the schools contribute to the religious mission of the sponsoring church, but they do not impose religious restrictions on faculty appointments and they place restrictions on teaching only to the extent that it not be contrary to the tenets of the sponsoring church. (Intervenors' Answers to Interrogatory 3).

Appendix A

of their actual expenditures for "mandated services." (Answers to Interrogatories 4, 7 and 11). This, of course, leaves a school free to expend any excess for whatever purpose it wishes, including religious or sectarian objectives.

Since the statute is predicated—and its constitutionality allegedly justified—on the ground that it merely reimburses the nonpublic schools for expenses of state-mandated services, post-enactment studies have been conducted comparing the actual cost to the schools of performing services with the amounts allocated to them by the state. The conclusions to be drawn from such reports (Exhibit D to Defendant Nyquist's Answers to Plaintiffs' Interrogatories) are cloudy. If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses. Doubt as to which standard is properly applied is occasioned by material submitted by the Commissioner to the Board of Regents at its request which states (Exhibit G to Defendant Nyquist's Answers to Interrogatories, at p. ES 1.9):

"... only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated*. Inclusion of such costs only would reduce the examination figure [of \$68,853] by \$66,629." (Emphasis in original).

While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or, indeed, whether they can be regarded as specifically "mandated."

Plaintiffs contend that on its face, and as applied, the statute violates the establishment clause of the First Amendment to the federal constitution, as well as Article XI, section 3, of the New York constitution, because its purpose and

Appendix A

primary effect is to advance religion and it gives rise to excessive governmental involvement and entanglement in religion.³

Defendants and intervenors argue that the statute is constitutionally justified since payments are made solely as reimbursement for the expenses of furnishing secular services mandated by the state. They contend that the Act constitutes neither sponsorship, financial support, nor active involvement in religious activity by the state and does not cause excessive entanglement of church and state. They also claim that, aside from the merits, the complaint should be dismissed for "lack of jurisdiction"⁴ because the complaint raises a threshold question under the constitution of New York." This contention was exhaustively treated and rejected by the convening judge (*Committee for Public Education and Religious Liberty, et al, v. Rockefeller, et al*, 322 F.Supp. 678, 687 (S.D.N.Y. 1971)). We agree with his view that neither abstention nor dismissal for the reason suggested is appropriate here. The federal and state issues are of equal importance. The statute is unambiguous on its face, and under the rule of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the court should "proceed to the federal constitutional claim." Furthermore, abstention is particularly unsuitable in this case because, as indicated in the convening judge's opinion (322 F.Supp. at 688), plaintiffs have no standing under New York law to litigate the state constitutional question in the New York courts. We are unim-

³ Plaintiffs also allege that the statute constitutes compulsory taxation in aid of religion in violation of the free exercise clause of the First Amendment. In view of that rationale by which we dispose of the case, it is unnecessary to consider this argument.

⁴ Defendants state the position in their brief as follows:

"The complaint should be dismissed on the ground that the Court lacks jurisdiction over the subject matter of the action in that the complaint raises a threshold question of the constitutionality of the statute under the provisions of the constitution of the State of New York."

We assume that defendants wish us to apply the doctrine of abstention, since it is clear that the Court has jurisdiction of the First Amendment issue.

Appendix A

pressed by the proposal in the state's brief that we should abstain because "there is no assurance that that Court [i.e., Court of Appeals of New York] would not now reverse the position that it took in earlier cases . . ." in the light of the holding in *Flast v. Cohen*, 392 U.S. 83 (1967), that a federal taxpayer has standing to sue for constitutional violations. Nothing in the New York Court of Appeals' decisions since *Flast* encourages or supports the state's argument on this point.

II.

We come to the federal constitutional question. We are guided so clearly by the decision of the Supreme Court last term in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), that we need not review at length earlier cases which articulated constitutional limits on governmental assistance to church-supported schools. The boundaries of permissible government action in the field were set by *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968). In *Everson*, the Court upheld a New Jersey statute which reimbursed parents for bus fares of children attending parochial schools. However, the *Everson* Court cautioned that its decision carried to "the verge" of what Chief Justice Burger, in *Lemon*, described as the "forbidden territory under the Religion Clauses." In *Allen*, the Court found that a New York law under which the state loaned school books to students at parochial schools passed constitutional muster. Neither case involved a statute which, as here, grants direct subsidies to parochial schools; and in *Lemon* the Court struck down two such plans.

The *Lemon-Earley* decision dealt with Pennsylvania and Rhode Island statutes which, as here, provided for cash payments intended to assist parochial schools in the acknowledgedly grave financial crisis which faces them. The Rhode Island statute, resting on a legislative finding that the quality of education available in nonpublic schools was jeopardized by rising salaries needed to attract teachers, authorized state officials to supplement the salaries of teachers of secular subjects

Appendix A

in nonpublic elementary schools by direct limited payment to the teacher. The teacher was bound to teach only subjects and use only teaching materials offered in public schools, and not to teach any course in religion. Eligible schools were required to submit to the state financial data necessary to determine the propriety of payments under the Act. The Pennsylvania statute, also based on a legislative finding of rapidly rising costs in the state's nonpublic schools, authorized the Superintendent of Public Instruction to "purchase" "secular educational services" from nonpublic schools. The purchase was consummated by state reimbursement to nonpublic schools of actual expenses for teachers' salaries, text books and materials. To secure reimbursement, a school was required to follow specified accounting procedures subject to state audit. Reimbursement was limited to such secular courses as mathematics, foreign languages, physical science, and physical education, and prohibited courses that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

From this analysis it is apparent that the New York statute before us more closely resembles the Pennsylvania than the Rhode Island statute, and our decision is guided by the Supreme Court's observations as to the former. Indeed, the sole differences of substance which exist between the Pennsylvania statute and New York's mandated services law are that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing; and under the Pennsylvania statute a school was required, subject to audit, to account to the state, while here the school is not. We find these distinctions insufficient to avoid the rule of *Lemon-Earley*, concluding, as did the *Lemon* Court, "that the cumulative impact of the entire relationship arising under the statute[s] . . . involves excessive entanglement between government and religion."

The *Lemon* Court's finding of excessive entanglement was based on an examination of the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the

Appendix A

government and the religious authority." *Lemon*, supra, at 615.

In the case at hand there is no question as to the character and purposes of the institutions which are benefited. No dispute exists as to the close association of the schools to the religious institutions of various faiths which support them. Indeed, the record establishes that payments are made to schools which, for example, impose religious restrictions on admissions, require attendance of pupils at religious activities, and are an integral part of the religious mission of the supporting church.

The nature of the aid provided here is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Even before its holding in *Lemon* that such payments violated the establishment clause, the Court had cautioned in *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970) :

"Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."

The defendants here contend that the rationale of *Lemon-Earley* and the quoted *Walz* passage are inapplicable to the New York statute, which does not require, either on its face or as administered, any "detailed administrative relationship for enforcement" of the statute. It is said that, since the New York law simply does not require beneficiaries to report on their use of the funds, the vice foreseen in *Walz* and found fatal in *Lemon* does not exist here.

The argument is unpersuasive. As the *Lemon* Court commented:

"The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." (at 621).

Appendix A

We think this lesson of history is applicable here. Indeed, the gentle inquiry of the Board of Regents which caused studies to be made to determine whether the costs to the nonpublic schools for mandated services are actually as great as the amounts they receive from the state is a sort of inching in that direction. It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Indeed, section 8 of the statute itself states: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." It is difficult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now, to keep their shares of the apportioned moneys regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. The dilemma we have outlined is insoluble. Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Defendants argue that the strictures of *Lemon* and *Walz* against cash payments do not apply here because reimbursement is being made for services which are "secular, neutral, or nonideological" (*Lemon*, at 616) analogous to the payments which were approved in *Everson* and *Allen*. The analogy, however, is inapposite. Bus transportation, school lunches, public health services, and secular text books (for which payment

Appendix A

was approved in *Everson*, *Allen* and other cases) are of a character entirely different from services rendered by teachers in administering tests not only developed by the state, but those developed by the schools or the teachers. By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon*, "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* and *Allen* inapplicable. Nor does the fact that the reimbursement by New York is for "mandated services" rescue the statute. It is true, of course, that administration of tests, recording attendance of students, and compiling health records are required by the state, but so is teaching required by the state if a private school, parochial or otherwise, is to be certified as an adequate substitute for public school. It would be fanciful to suggest, however, that the state would be free to reimburse the schools for ordinary teaching expenses on the theory that the state "mandates" such services.

Even if all these observations were not true, the statute would nevertheless be constitutionally flawed. As the *Lemon-Earley* Court stated:

"A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." (at 622) .

The Court held there that in a community with a large number of pupils served by church-related schools (surely true in the present case) it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation. The Court concluded (at 622) that "... political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Measured by this standard, the New York statute suffers precisely the same constitutional defects as both the Pennsylvania and Rhode Island statutes in *Lemon-Earley*.

. . . To uphold this statute would be to introduce the religious issue to the very center of state politics . . . the political issue will be an expansive one . . . with the result that the issue will be joined along sharply drawn religious lines."

The two judges of the Federal District Court in this case have likewise implied that restrictions are imposed on the freedom of the state legislature to debate legislation touching on religious issues. The majority decision noted that:

" . . . it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents."

The pronouncement of this Court in the *Lemon* case, as applied in this line of recent Federal cases, has been resorted to with devastating consequences. Underway is a dangerous trend to restrict the freedom historically enjoyed by the New York State Legislature and other legislative bodies to respond to diverse problems, which by necessity demands free and open discussion of every conceivable issue. As noted by Judge Edmund L. Palmieri in his dissent in this case:

Government and political activity should play a part in searching ". . . for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

In the event that this concept curtailing legislative debate is continued in this action, no longer will legislative bodies operate as a forum for free and open discussion. Indeed there is a danger that the resolution of peculiarly volatile issues will no longer continue within the framework of our democratic process. It is submitted that the unfortunate trend that may develop from these recent federal court decisions is to encourage elements of our society to seek solutions to our social, political and economic problems in a manner that is "extra-legal."

The courts of the United States have attempted to exercise a jurisdiction so large and so great in terms of breadth and width, that sometimes those who serve in the states of the Union lose track of the fact that the Federal Government is not the paramount body in the United States of America. In the Federal Government and its Judiciary does not repose the sovereignty, except to the extent that the states have given it to them. The sovereignty of the individual and of the states under the reserved powers concept (U.S. Constitution Articles IX and X) reposes not there but with the states, and the fact that the states do have this residuum of sovereignty makes theirs the responsibility of preserving that which remains.

It is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its debate. In giving birth to our Federation, the several states allowed and authorized the courts of the United States to pass upon the constitutional issues of the final product, the statutes which are enacted. But no where can be found the authority for the courts to dictate that which would be the subject of colloquy.

CONCLUSION

The Final Report of the President's Panel on Nonpublic Education (U.S. Gov. Print Office, Stock No. 1780-0972) made the following pertinent observations, at pages 28-29, concerning this Court's decision in *Lemon v. Kurtzman*:

"In the Panel's view the full Court had an inadequate perception of realities in parochial schools because it failed to pierce the institutional veil. The entire focus was on the powers of the hierarchy, the role of the pastors, and the teaching commitment of religious; ignored were parents, teachers, and pupils who are now cut off from certain forms of public assistance.

"Others have launched sharper critiques. One such criticism holds that, by judicial fiat, there is now a virtual disenfranchisement of religiously committed people with respect to public policy questions about which their churches have a strong position. They ask whether the civil rights of Lutherans or Jews or Quakers are to be

suppressed under the guise of 'no religious division' in the same way that the civil rights of Negroes were curtailed by a Supreme Court ruling (*Plessy v. Ferguson*, 1896) that 'separate but equal' treatment was necessary for peace and order. Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to nonpublic school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted.

"Whatever legal opinions are involved, the Panel shares Mr. Justice White's minority statement that not only has the majority decision ignored the evidence in the Rhode Island case ('on this record there is no indication that entanglement difficulties will accompany the salary supplement program') but that—

'The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.'

"Repercussions from this decision have been many. Michigan, Connecticut, and Ohio had plans to use State funds for teacher salary supplements, which have now been thwarted; plans for purchase of secular educational services in Illinois and New York have similarly fallen. Still to be decided are Maryland's scholarship plan, tax credit plans in Minnesota and Hawaii, and Illinois' multiple approach, which includes tuition vouchers for inner-city nonpublic school pupils.

"In summary, the law is still being molded and shaped by both judicial philosophies and political events so that the final phase in the Federal drama over nonpublic school education is still to be enacted."

It is submitted that Chapter 138 of the 1970 Laws of New York is such a constitutional enactment, consistent with and in

response to the guidelines set forth by this Court and the United States Constitution.

We contend that the majority decision of the District Court in this case fails to recognize the authority of the several states, under our Federal System, to legislate with respect to nonpublic school education. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Dated: August 16, 1972

Respectfully submitted,

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APPENDIX

- APPENDIX A—Opinion of the District Court for the Southern District of New York, dated April 27, 1972.
(Majority and Minority Opinions)
- APPENDIX B—Judgment of the District Court for the Southern District of New York, dated June 1, 1972.
- APPENDIX C—Chapter 138 of the 1970 Laws of New York.
- APPENDIX D—Notice of Appeal of Appellant, Senator Earl W. Brydges, filed July 14, 1972.
- APPENDIX E—Order of the District Court for the Southern District of New York, dated June 29, 1972,
Denying Motion to Stay Injunction.

Appendix A

**Opinion of the District Court for the Southern District of
New York, dated April 27, 1972**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

**COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, et al,**

Plaintiffs,

against

**ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the
State of New York,**

Defendants,

and

**CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL,
Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH
SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR
GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM,
Brooklyn, New York,**

Intervenor-Defendants.

**Before HAYS, Circuit Judge, PALMIERI and LASKER, District
Judges**

APPEARANCES:

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Attorney for Plaintiffs

Appendix A

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New York, New York

Attorneys for Intervenor-Defendants Bais Yaakov Academy for Girls and Yeshivah Rambam

LASKER, D. J.

We are called upon to determine the constitutionality of Chapter 138 of New York State's laws of 1970, which appropriates \$28,000,000 to be paid to nonpublic schools for expenses incurred in complying with requirements of state law of which the principal are the testing of pupils and maintenance of attendance and health records.¹

¹ The appropriation is to be paid to nonpublic schools "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Chap. 138 of the Laws of 1970).

Appendix A

In 1970 there were 850,000 students in nonpublic schools in New York. Chapter 138 includes the following legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

"That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

"That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs."

Plaintiffs are taxpayers of New York and an unincorporated association whose members are New York residents whose objectives include opposition to use of public funds for the support of sectarian or religious schools. Defendants are the Commissioner of Education, who administers the statute, and the State Comptroller, who makes payment of the appropriated funds. Intervenors are Catholic and Jewish parochial schools who are beneficiaries of the Act.

The record contains defendants' and intervenors' answers to plaintiffs' interrogatories. No factual disputes exist.

Plaintiffs sue to enjoin the enforcement of the statute. Defendants move for judgment, claiming that the statute violates neither the federal nor the state constitution, and to dismiss the complaint on the ground that it raises a threshold question of violation of the constitution of the State of New York.

Appendix A

While we thus conclude that Chapter 138 violates the establishment clause of the First Amendment, it is proper for us to note our sympathetic awareness of the serious financial problems directly facing the parochial schools and, indirectly, the public. We recognize and appreciate the contribution which private schools have made financially and in providing that variety of approach to education which enriches community life. But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star.

A permanent injunction against the enforcement of the statute will be granted. The defendants' motions are denied.

Submit order on notice.

Dated: New York, New York
April 27, 1972

PAUL R. HAYS, C.J.
MORRIS E. LASKER, D.J.

*Appendix A*UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
et al.,*Plaintiffs,*

- against -

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the
State of New York,*Defendants,*

- and -

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL,
Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH
SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR
GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM,
Brooklyn, New York.*Intervenor-Defendants.*

Before HAYS, Circuit Judge, PALMIERI and LASKER, District
Judges.

Dissenting opinion of PALMIERI, D.J.

PALMIERI, J.

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

Appendix A

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record-keeping and testing by nonpublic schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.¹ It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U.S. 672, 678 (1971), that

"candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government

¹ This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

Appendix A

activity in this sensitive area of constitutional adjudication"

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U.S. 644 (1970).² If, as the Supreme Court pointed out in *Allen*, *supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz*, *supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."

Accepting, as I believe we must, the basic premise that no perfect or absolute separation between religion and govern-

² This language is borrowed substantially from *P.O.A.U. v. Essex*, 28 Ohio State 2d 79 (1971).

Appendix A

ment is really possible, see *Walz v. Tax Commission of the City of New York*, *supra* at 670, I agree partly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State v. Oakey* (D.C. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

Dated: April 27, 1972

EDMUND L. PALMIERI, U.S.D.J.

Appendix B

Judgment of the District Court for the Southern District of New York, dated June 1, 1972

ORDER AND JUDGMENT

70 Civ. 3251

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER,
ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER AND HOWARD
M. SQUADRON,

Plaintiffs,

- against -

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the
State of New York,

Defendants.

This action having come on to be heard on the merits before the Court, the Honorable Paul R. Hays, Circuit Judge, the Honorable Edmund L. Palmieri and the Honorable Morris E. Lasker, District Judges for the Southern District of New York, and after hearing arguments of counsel, the Court having rendered an opinion dated April 27, 1972, it is hereby

ORDERED AND ADJUDGED

1. That the defendants' motion to dismiss the complaint is denied.

2. Chapter 138 of the Laws of the State of New York of 1970 is hereby declared to be unconstitutional in violation of the First Amendment of the United States Constitution.

Appendix B

3. The defendants and their agents and all persons acting for or on behalf of the State of New York are permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

4. The order and judgment of the Court filed on the 19th day of May, 1972, is hereby vacated.

Dated: New York, New York

June 1, 1972

PAUL R. HAYS, Circuit Judge
MORRIS E. LASKER, District Judge

Appendix C

Chapter 138 of the 1970 Laws of New York

AN ACT

To provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above-stated purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

Appendix C

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such

Appendix C

school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

Appendix C

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect September first, nineteen hundred seventy.

Appendix D

Notice of Appeal of Appellant, Senator Earl W. Brydges,
Filed July 14, 1972

70 Civ. 3251

FILED
U.S. DISTRICT COURT
JUL 14 934 AM '72
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER,
ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD
M. SQUADRON,

Plaintiffs,

– against –

NELSON A. ROCKEFELLER, as Governor of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of New
York, and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Defendants,

– and –

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS
and YESHIVAH RAMBAM,

Intervenor-Defendants,

– and –

SENATOR EARL W. BRYDGES, as Majority Leader and President
Pro Tem of the New York State Senate,

Intervenor-Defendant.

*Appendix D***Notice of Appeal to the Supreme Court
of the United States****SIRS:**

Notice is hereby given that the above-named intervenor-defendant Senator Earl W. Brydges hereby appeals to the Supreme Court of the United States from the Final Order and Judgment entered in this action on June 1, 1972 permanently enjoining the "defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools", and from each and every part thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
July 1, 1972

Yours, etc.
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LOUIS P. CONTIGUGLIA
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Appendix D

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Appendix E

Order of the District Court for the Southern District
of New York, dated June 29, 1972, Denying
Motion to Stay Injunction

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
et al.,

Plaintiffs,

- against -

NELSON A. ROCKEFELLER, as Governor of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of New
York, and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Defendants,

- and -

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS
and YESHIVAH RAMBAM,

Intervenor-Defendants,

- and -

EARL W. BRYDGES, as Majority Leader and President Pro Tem
of the New York State Senate,

Intervenor-Defendant.

This action having come on to be further heard upon the
motion of the Attorney General of New York on behalf of
defendants Arthur Levitt, as Comptroller of the State of New
York and Ewald B. Nyquist, as Commissioner of Education of

Appendix E

the State of New York dated June 12, 1972, and upon the motion of Messrs. Davis Polk & Wardwell, on behalf of the intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School, dated June 5, 1972, and upon the motion of intervenor-defendant Earl W. Brydges made orally at a hearing before the Court on June 20, 1972, for an order suspending the injunction heretofore entered, pending the hearing and determining of the defendants' and intervenor-defendants' appeal to the United States Supreme Court from the judgment entered June 1, 1972, in this Court, and upon all the papers submitted in support of said motions and after hearing counsel for all parties, it is hereby:

ORDERED that said motions for an order suspending the injunction heretofore entered on June 1, 1972 be, and the same hereby are, denied, Judge Palmieri dissenting.

Dated New York, N. Y.
June 29, 1972

PAUL R. HAYS, U.S.C.J.
MORRIS E. LASKER, U.S.D.J.

TABLE OF CONTENTS

	PAGE
Preliminary Statement	2
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Question Presented	3
Statement of the Case	4
The Questions Are Substantial	7
Conclusion	21

APPENDIX

Opinion of Lasker, D. J. and Hays, C. J. dated April 27, 1972	1a
Dissenting Opinion of Palmieri, D. J. dated April 27, 1972	14a
Order and Judgment of Hays, C. J. and Lasker, D. J. entered June 1, 1972	18a
Notice of Appeal of Cathedral Academy, St. Am- brose School and Bishop Loughlin Memorial High School	20a
Notice of Appeal of Bais Yaakov Academy for Girls and Yeshivah Rambam	23a
Chapter 138 of the 1970 Laws of New York	26a

TABLE OF AUTHORITIES

Cases

	PAGE
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968)	7, 10, 19
<i>Committee for Public Education & Religious Liberty v. Rockefeller</i> , 322 F. Supp. 678 (S.D.N.Y. 1971)	5, 14
<i>Earley v. DiCenso</i> , 403 U.S. 602 (1971)	3, 17
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947)	11
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	3, 12, 13, 16, 17
<i>Robinson v. DiCenso</i> , 403 U.S. 602 (1971)	3, 17
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	3, 13, 14, 15 17, 18, 19

Statutes, Regulations and Rules

28 U.S.C. § 1253	3
28 U.S.C. § 1343(3)	2
28 U.S.C. § 2101(b)	3
28 U.S.C. § 2281	2, 5
28 U.S.C. § 2284	2, 5
Fed. R. Civ. P. 12(b)(1) and (6)	5
Fed. R. Civ. P. 24	5, 7
Fed. R. Civ. P. 62(c)(1)	6
N.Y. Educ. Law § 207	8
N.Y. Educ. Law § 215	8
N.Y. Educ. Law §§ 801-10	9
N.Y. Educ. Law § 3204	7, 8, 9

	PAGE
N.Y. Educ. Law § 3210(2)	9
N.Y. Educ. Law § 3211	9
[1892] Laws of N.Y. ch. 378, § 26	20
Regulations of the Commissioner of Education	
§ 176.1(b)	10

Other

N.Y. Times, May 5, 1972	20
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IN THE
Supreme Court of the United States

October Term, 1972

No. -----

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

—and—

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
GIRLS and YESHIVAH RAMBAM,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
HOWARD M. SQUADRON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT of APPELLANTS
CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL,
BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL,
BAIS YAAKOV ACADEMY FOR GIRLS and
YESHIVAH RAMBAM.

Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam appeal from the judgment of the United States District Court for the Southern District of New York entered on June 1, 1972, permanently enjoining the enforcement of a statute of the State of New York, and submit this Statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the majority of the United States District Court for the Southern District of New York, upon which the judgment appealed from was entered, and the dissenting opinion are, as yet, unreported. Copies of both opinions are set forth in the Appendix hereto, commencing at pages 1a and 14a. An earlier opinion granting appellees' motion to convene a three-judge District Court in this case is reported at 322 F.Supp. 678.

Jurisdiction

This suit was brought pursuant to 28 U.S.C. §§ 1343(3) and 2281, 2284 to enjoin the enforcement of a statute of the State of New York as being in violation of the First Amendment to the United States Constitution. The judgment of the District Court was entered on June 1, 1972. A copy of the judgment is set forth in the Appendix, pages 18a-19a. Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School filed their Notice of Appeal on June 30, 1972 in the District Court. Appellants Bais Yaakov Academy for Girls and

Yeshivah Rambam filed their Notice of Appeal in the District Court on July 11, 1972. Copies of both notices of appeal are set forth in the Appendix at pages 20a and 23a, respectively.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The most recent cases sustaining the jurisdiction of this Court to review the judgment in this case on direct appeal are *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

Statute Involved

The statute involved is Chapter 138 of the 1970 Laws of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor," the full text of which is set forth in the Appendix, commencing at page 26a.

Question Presented

Whether Chapter 138 of the 1970 Laws of New York, which reimburses religiously-affiliated nonpublic schools for the record keeping and other secular services which they are required to perform under the New York Education Law, gives rise to "excessive entanglement" between church and state and violates the Establishment Clause of the First Amendment to the United States Constitution.

Statement of the Case

Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam are nonpublic elementary and/or secondary schools situated in the State of New York. Appellants Levitt and Nyquist are Comptroller and Commissioner of Education of the State of New York, respectively. Appellant Senator Earl W. Brydges is the Majority Leader and President Pro Tem of the New York State Senate.

Chapter 138 of the 1970 Laws of New York [hereinafter referred to as "Mandated Services Act" or the "Act"] provides for the reimbursement of nonpublic schools for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The reimbursement formulas for such services are 15 cents per day per pupil in grades one through six and 25 cents per day per pupil in grades seven through twelve.

On July 30, 1970, appellees, the individuals among whom allegedly are New York taxpayers, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia*, that appellants Levitt and Nyquist be permanently enjoined from approving or paying any funds of the State of New York pursuant to the

Mandated Services Act to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith.

Appellants Levitt and Nyquist (and defendant Nelson A. Rockefeller, as Governor of the State of New York) moved to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure (FRCivP). Appellees moved for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284. Thereafter, appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam, all of which were eligible for payments under the Mandated Services Act, moved to intervene as parties defendant pursuant to Rule 24, FRCivP.

On November 10, 1970, Judge Morris E. Lasker, before whom the motions came on to be heard, granted the motion to intervene. On January 28, 1971, he granted defendant Rockefeller's motion to dismiss the complaint as to him but denied the motion to dismiss in all other respects. See *Committee for Public Education & Religious Liberty v. Rockefeller*, 322 F.Supp. 678 (S.D.N.Y. 1971). Judge Lasker also ruled that the complaint raised a substantial federal constitutional question and that it was therefore necessary to convene a three-judge District Court, whereupon such a court consisting of Judge Lasker, the Hon. Paul R. Hays, U. S. Circuit Judge and the Hon. Edmund L. Palmieri, U. S. District Judge, was duly constituted on February 24, 1971. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion, concurred in by Judge Hays, that the Mandated Services Act violates the Establishment Clause of the First Amendment to the United States Constitution. The opinion reads, in part, as follows:

... Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen. Appendix, p. 11a.

Judge Palmieri dissented, stating that in his opinion, the Mandated Services Act is

a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. Appendix, p. 15a.

On June 1, 1972, the judgment appealed from herein was entered, permanently enjoining appellants Levitt and Nyquist "and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any monies heretofore or hereafter expended by nonpublic elementary and secondary schools."

On June 20, 1972, the three-judge District Court reconvened to hear in open court the motion of appellants Levitt, Nyquist, Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School to suspend its injunction pursuant to Rule 62(c)(1), FRCivP pending

appeal to this Court. At that time, the District Court granted the motion of appellant Senator Earl W. Brydges for leave to intervene in the proceedings as a party defendant pursuant to Rule 24, FRCivP, and he thereupon joined in the motion to suspend the injunction pending appeal.¹

The Questions Are Substantial

The Mandated Services Act is unlike any other statute in the United States. It results from the supervision which the State of New York has historically exercised over the education of children in nonpublic schools.

The public and nonpublic schools in the State of New York comprise (and have long comprised) a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education, who are empowered and required to ensure that all the schools in the system give their pupils an adequate education along the lines laid down by statute and by the regulations of the Commissioner. The broad extent to which nonpublic schools in New York are regulated and controlled by state authority with respect to the secular aspects of their operations was noted by this Court in *Board of Education v. Allen*, 392 U.S. 236 (1968).

The compulsory education statute (N.Y. Educ. Law § 3204) requires all children to attend full-time instruction

¹ The motion was denied on June 29, 1972, Judge Palmieri dissenting. On July 17, 1972, Mr. Justice Blackmun denied the application of appellants Levitt, Nyquist, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School and Senator Earl W. Brydges for a stay pending filing and final disposition of this appeal.

"at a public school or *elsewhere*." If "*elsewhere*," the instruction given must be "*at least substantially equivalent*" to that given in the public schools of the district where the child resides. To ensure this, statutes and regulations impose a long list of detailed requirements upon nonpublic schools in such fields as attendance, curricula, accreditation, examinations and diplomas. The Regents and the Commissioner have long been given the broadest powers of visitation and inspection. Section 215 of the New York Education Law provides:

The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.²

Under N.Y. Educ. Law § 207, the Regents are granted broad "legislative functions" over the entire field of education, both public and nonpublic. Section 3204 of the Education Law prescribes the type of instruction required under the compulsory education system and outlines in subsection (3) thereof twelve courses to be taken by every pupil in public elementary and secondary schools. Section 3204(2) provides:

² N.Y. Educ. Law § 202 defines "any institution in the university" as including all institutions of learning, both public and nonpublic.

Quality and language of instruction; textbooks. Instruction may be given only by a competent teacher. . . . Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

Thus, pupils in nonpublic elementary schools are required by state law to receive instruction comparable to their public school brethren in the "twelve common school branches" of arithmetic, reading and other essential secular subjects. In addition to providing instruction in accordance with Section 3204, all nonpublic schools must provide instruction in a long list of other specified areas.³ The Education Law also contains provisions mandating the amount and character of attendance by pupils at nonpublic schools (Section 3210(2)) and requiring such schools to maintain appropriate attendance records (Section 3211). Pupil health records must be maintained by nonpublic, as well as public, schools. In addition, nonpublic schools must maintain records relating to the qualifications and characteristics of their teaching personnel for inspection by state authorities. The Mandated Services Act provides for reimbursement of nonpublic schools for the expenses incurred in connection with the administrative burden imposed by these state requirements.

The reimbursement formulas in the Act are 15 cents per day of attendance for pupils in grades one through six and 25 cents per day of attendance for pupils in grades seven through twelve. Based on attendance of 180 days, nonpublic schools are reimbursed in the amounts of \$27

³ See N.Y. Educ. Law §§ 801-10.

per elementary pupil per year and \$45 per secondary pupil per year. Part of the record in this case is an Exhibit D to the Answers of appellant Nyquist to appellees' interrogatories. This exhibit is a report of studies conducted under the auspices of the New York State Education Department which concludes that the apportionment formulas of the Mandated Services Act are justified. That is, based on actual analyses of the specific services mandated⁴ and thus provided and the costs thereby incurred by a number of nonpublic schools in New York State, the studies showed in each instance that the schools incurred greater costs in providing the various neutral, nonideological services than they were reimbursed for under the Act. This was pointed out by Judge Palmieri in dissent. *See infra*, p. 16.

In *Allen*, this Court put the matter of state regulation of nonpublic schools in the following terms:

Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.

⁴ One of the Regulations of the Commissioner of Education, § 176.1(b), requires, for example, that:

[A nonpublic] school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating the pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.

The state-prescribed examinations are the so-called PEP (Pupil Evaluation Program) tests, Regents examinations and Regents Scholarship examinations. These exams, while important, are, of course, only a small part of the entire, continuing program of testing and evaluation of pupils which is required.

Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters*: 'if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a "public purpose", and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana's interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: "[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."⁵

The Mandated Services Act did not establish a relationship between the State of New York and nonpublic schools where none existed before or where such relationships, on their face, are constitutionally impermissible. This relationship, insofar as is pertinent here, was created by the various statutes, rules and regulations imposing requirements on nonpublic schools. The Act merely assures full compliance therewith.

There is no decision of this Court or of any other court controlling the issues of law and fact raised in the District

⁵ 392 U.S. at 245-47 (footnotes omitted). See also *Everson v. Board of Education*, 330 U.S. 1, 17 (1947).

Court and now raised on appeal. The clearest indication of this is the incisive dissenting opinion of Judge Palmieri.

The majority opinion of the District Court relies primarily on the decision of this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But that decision dealt specifically with a Pennsylvania enactment providing for that state's payment of parochial schoolteachers for teaching mathematics, modern foreign languages, physical science and physical education and a Rhode Island statute providing for the payment by that state of salary supplements to parochial schoolteachers in the amount of 15 percent of their salaries. Clearly, neither law examined in *Lemon v. Kurtzman* had anything to do with the neutral, nonideological services required of, and provided by, all schools, public and nonpublic alike, and which are within the purview of the Mandated Services Act. Indeed, this Court took specific note of the fact in *Lemon v. Kurtzman* that its "decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." 403 U.S. at 616-17. Judge Palmieri stated the matter as follows:

... It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Cochran v. Louisiana*

State Board of Education, 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U.S. 644 (1970). If, as the Supreme Court pointed out in *Allén, supra*, at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* . . . Appendix, pp. 16a-17a (footnote omitted).

In the *Lemon v. Kurtzman* opinion, this Court stated in reference to cases such as the one at bar that:

. . . Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion" . . . 403 U.S. at 612-13.

In the companion decision handed down at the same time, *Tilton v. Richardson*, 403 U.S. 672 (1971), the lead opinion contains a fourth test, to wit, "does the implementation of

the Act inhibit the free exercise of religion?" 403 U.S. at 678. These tests were raised as the controlling issues, argued and briefed in the District Court. None of the three judges in that court found that the Mandated Services Act has a sectarian purpose or that its principal or primary effect is the advancement of religion or that its implementation has inhibited the free exercise of religion.⁶ Indeed, Judge Lasker had earlier stated in his opinion granting the motion to convene the three-judge District Court that:

We may admit that the statute's purpose is not offensive. The objectives of assuming that New York's "precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century" is beyond question a worthy and legitimate legislative concern.⁷

However, two judges in the District Court concluded that:

The nature of the aid provided here [by the Act] is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Appendix, p. 9a.

Even if this were true (and it obviously is not), the two judges overlooked much precedent in this regard, which was summarized as follows in the lead opinion in *Tilton*:

⁶ The Mandated Services Act had been fully enforced for the better part of two school years before the District Court was called upon to act upon appellees' claim(s) for relief, and the court therefore had more than appellees' hypotheses about the Act upon which to gauge the tests with respect to the Act's purpose and effects.

⁷ *Committee for Public Education & Religious Liberty v. Rockefeller*, 322 F.Supp. 678, 683 (S.D.N.Y. 1971).

The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid those institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

Despite the almost two years of uninterrupted enforcement of the Mandated Services Act in New York, the District Court majority's opinion resorts to speculation to support the conclusion that the Act represents unconstitutional excessive entanglement between church and state. For example:

... It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Appendix, p. 10a.

And:

It is difficult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting

the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now, to keep their shares of the apportioned monies regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. Appendix, pp. 10a-11a.

But, Judge Palmieri pointed out:

The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. Appendix, p. 15a.

In holding the Pennsylvania statute in *Lemon v. Kurtzman* unconstitutional, this Court pointed out that that state's "post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." 403 U.S. at 621-22. No auditing of the books of nonpublic schools is provided for or required by the Mandated Services Act. Furthermore, the Act has not given rise to a "comprehensive, discriminating, and continuing state of surveillance," something which this Court found to be inevitably required in *Lemon v. Kurtzman*. See 403 U.S. at 619. Whatever surveillance is involved herein has existed and been carried out as a result of the

long-established procedures under the compulsory education laws, not the enactment of the Mandated Services Act. In short, the Act does not present the potential for excessive involvement or entanglement which led this Court to strike down the teachers' salary supplement statutes in *Lemon v. Kurtzman* and *DiCenso*. First, the services mandated are purely secular. *E.g.*, attendance records. Secondly, the requirement for these services originated with the state. *E.g.*, filing of Report of Nonpublic Schools. Third, the costs incurred in providing these services have been carefully determined. *E.g.*, \$27 per year per elementary school pupil, \$45 per year per secondary school pupil. And fourthly, the money apportioned pursuant to the Mandated Services Act is done so retroactively, i.e., as reimbursement for the services already rendered.⁸

In *Lemon v. Kurtzman*, this Court stated that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." 403 U.S. at 615. In *Tilton*, it was pointed out that "[n]o one of these three factors standing alone is necessarily controlling." 403 U.S. at 688 (Burger, C.J.).

The lead opinion in *Tilton* states that a statute cannot be declared unconstitutional on the basis of a hypothetical "profile". See 403 U.S. at 682. Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial

⁸ A nonpublic school applying for reimbursement must submit proof that it provided all of the services mandated on a simple Form SA-170, a copy of which is in the record as Exhibit H-1 annexed to appellant Nyquist's Answers to appellees' interrogatories. Doc. No. 24, Record on Appeal.

High School are all affiliated with the Roman Catholic Church. Appellants Bais Yaakov Academy for Girls and Yeshivah Rambam are Jewish day schools. The record in this case (in the form of answers to interrogatories⁹) shows that none of the three Catholic schools actually before the District Court and now this Court is an integral part of the religious mission of the Church. All are an integral part of the communities in which they are located. Their *raison d'être* is education. They do not impose religious restrictions on pupil admissions or on faculty appointments. They do not require their pupils to attend religious activities or to adhere to a particular faith. Indeed, the character and purposes of appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are essentially similar to the character and purposes found to exist with respect to the four Catholic colleges in Connecticut, which were the subject of this Court's decision in *Tilton*. Chief Justice Burger observed:

... All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic.^[10] Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught ac-

⁹ Doc. No. 21, Record on Appeal.

¹⁰ This is not true with respect to Cathedral Academy, and it may not be true with respect to Bishop Loughlin Memorial High School. Out of a total enrollment of 513 pupils at Cathedral Academy, 231 are non-Catholic. In addition, 95% of Cathedral Academy's pupils come from a poverty area of Albany; 235 are black. Bishop Loughlin Memorial High School maintains no records of the religious affiliations of its students. More than half, however, come from federally designated poverty areas.

cording to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally, as we have noted, these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education. 403 U.S. at 686-87.

This Court in *Allen* specifically refused to assume that religiosity in the parochial elementary and secondary schools of the State of New York necessarily permeates the secular education that they provide. *See Tilton v. Richardson*, 403 U.S. at 681. The appellees in this case did not prove otherwise in the District Court.

In summary, an examination of the record in this case with respect to the nature of the aid that the state provides, the relationship between the state and nonpublic schools and the character and purposes of the institutions involved should indicate to this Court that the record does not support the District Court majority's conclusion that the Mandated Services Act entails unconstitutional excessive entanglement between church and state.

The record in this case also does not support the District Court majority's speculation with respect to divisive po-

litical activity.¹¹ Indeed, both the history of the Mandated Services Act and the history of nonpublic education in the State of New York, in general, show a remarkable lack of political divisiveness.¹² Certainly, differences of opinion are part of the American political process. But divisiveness, in the negative context of the word, has been all but nonexistent with respect to the Mandated Services Act. There has not been any annual legislative appropriation dispute over the Act. Furthermore, there hardly could be such discord in view of the Act's limited scope and restricted, precise formulas. Then again, public and nonpublic schools have constituted a unitary system of education in the State of New York since the eighteenth century, and this long history clearly belies any potential for political divisiveness in this area. For example, from 1892 through 1968, state monies were apportioned to nonpublic schools in compliance with state rules and regulations. *See, e.g.*, An Act to Revise and Consolidate the Laws Relating to the University of the State of New York, [1892] Laws of N.Y. ch. 378, §26. The history of this legislation hardly manifests political divisiveness or even a potential therefor.

¹¹ *See* Appendix, p. 12a.

¹² In fact, the only divisiveness with respect to the Mandated Services Act seems to have been generated by the appellees, who, as Judge Palmieri noted, "appear to be making a career of this type of destructive litigation." Appendix, p. 15a, n.1. *Cf.* N.Y. Times, May 5, 1972, at 40, cols. 3-4.

Conclusion

In view of the foregoing, it is submitted that the majority of the District Court was in error in concluding that the Mandated Services Act is unconstitutional, as has been so succinctly pointed out by their colleague, Judge Palmieri, and that the questions presented by this appeal are substantial and are of extraordinary public importance.

Dated: August 16, 1972

Respectfully submitted,

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Opinion of Lasker, D.J. and Hays, C.J.
Dated April 27, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE
SCHOOL, Rochester, New York, BISHOP LOUGHLIN ME-
MORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV
ACADEMY FOR GIRLS, Richmond Hill, New York, and
YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

Before

HAYS, *Circuit Judge*,
PALMIERI and LASKER, *District Judges*

LASKER, D.J.

We are called upon to determine the constitutionality of
Chapter 138 of New York State's laws of 1970, which appro-

Opinion of Lasker, D.J. and Hays, C.J.

priates \$28,000,000 to be paid to nonpublic schools for expenses incurred in complying with requirements of state law of which the principal are the testing of pupils and maintenance of attendance and health records.¹

In 1970 there were 850,000 students in nonpublic schools in New York. Chapter 138 includes the following legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

"That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

"That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs."

¹ The appropriation is to be paid to nonpublic schools "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Chap. 138 of the Laws of 1970).

Opinion of Lasker, D.J. and Hays, C.J.

Plaintiffs are taxpayers of New York and an unincorporated association whose members are New York residents whose objectives include opposition to use of public funds for the support of sectarian or religious schools. Defendants are the Commissioner of Education, who administers the statute, and the State Comptroller, who makes payment of the appropriated funds. Intervenors are Catholic and Jewish parochial schools who are beneficiaries of the Act.

The record contains defendants' and intervenors' answers to plaintiffs' interrogatories. No factual disputes exist.

Plaintiffs sue to enjoin the enforcement of the statute. Defendants move for judgment, claiming that the statute violates neither the federal nor the state constitution, and to dismiss the complaint on the ground that it raises a threshold question of violation of the constitution of the State of New York.

I.

The statute, which became effective July 1, 1970, directs the Commissioner of Education to apportion annually to nonpublic schools the sum of \$27 for each pupil in average daily attendance in the first six grades and \$45 for those in grades seven through twelve. The express purpose of the expenditure, as indicated above, is to compensate the schools for services "mandated" by state law or regulation of the Commissioner. These services include administration of compulsory attendance laws, Regents' examinations, and pupil evaluation program tests, as well as preparation of various reports intended to assure that minimum state educational standards are met. The services rendered are required of public and nonpublic schools alike.

Opinion of Lasker, D.J. and Hays, C.J.

The Act is construed and applied by the defendants to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7).²

The beneficiary schools are required neither to account for nor return to the state any amounts received by them in excess of their actual expenditures for "mandated services." (Answers to Interrogatories 4, 7 and 11). This, of course, leaves a school free to expend any excess for whatever purpose it wishes, including religious or sectarian objectives.

Since the statute is predicated—and its constitutionality allegedly justified—on the ground that it merely reimburses the nonpublic schools for expenses of state-mandated services, post-enactment studies have been conducted compar-

² It should be pointed out that intervenors Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on admissions or require attendance of pupils at religious activities or obedience by students to the doctrine of a particular faith; that the schools contribute to the religious mission of the sponsoring church, but they do not impose religious restrictions on faculty appointments and they place restrictions on teaching only to the extent that it not be contrary to the tenets of the sponsoring church. (Intervenors' Answers to Interrogatory 3).

Opinion of Lasker, D.J. and Hays, C.J.

ing the actual cost to the schools of performing services with the amounts allocated to them by the state. The conclusions to be drawn from such reports (Exhibit D to Defendant Nyquist's Answers to Plaintiffs' Interrogatories) are cloudy. If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses. Doubt as to which standard is properly applied is occasioned by material submitted by the Commissioner to the Board of Regents at its request which states (Exhibit G to Defendant Nyquist's Answers to Interrogatories, at p. ES 1.9):

"... only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated*. Inclusion of such costs only would reduce the examination figure [of \$68,853] by \$66,629." (Emphasis in original).

While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or, indeed, whether they can be regarded as specifically "mandated."

Plaintiffs contend that on its face, and as applied, the statute violates the establishment clause of the First Amendment to the federal constitution, as well as Article 11, section 3, of the New York constitution, because its purpose and primary effect is to advance religion and it

Opinion of Lasker, D.J. and Hays, C.J.

gives rise to excessive governmental involvement and entanglement in religion.³

Defendants and intervenors argue that the statute is constitutionally justified since payments are made solely as reimbursement for the expenses of furnishing secular services mandated by the state. They contend that the Act constitutes neither sponsorship, financial support, nor active involvement in religious activity by the state and does not cause excessive entanglement of church and state. They also claim that, aside from the merits, the complaint should be dismissed for "lack of jurisdiction"⁴ because the complaint raises a threshold question under the constitution of New York. This contention was exhaustively treated and rejected by the convening judge (*Committee for Public Education and Religious Liberty, et al. v. Rockefeller, et al.*, 322 F.Supp. 678, 687 (S.D.N.Y. 1971)). We agree with his view that neither abstention nor dismissal for the reason suggested is appropriate here. The federal and state issues are of equal importance. The statute is unambiguous on its face, and under the rule of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the court should "proceed to the federal constitutional claim." Furthermore, abstention is partic-

³ Plaintiffs also allege that the statute constitutes compulsory taxation in aid of religion in violation of the free exercise clause of the First Amendment. In view of that rationale by which we dispose of the case, it is unnecessary to consider this argument.

⁴ Defendants state the position in their brief as follows:

"The complaint should be dismissed on the ground that the Court lacks jurisdiction over the subject matter of the action in that the complaint raises a threshold question of the constitutionality of the statute under the provisions of the constitution of the State of New York."

We assume that defendants wish us to apply the doctrine of abstention, since it is clear that the Court has jurisdiction of the First Amendment issue.

Opinion of Lasker, D.J. and Hays, C.J.

ularly unsuitable in this case because, as indicated in the convening judge's opinion (322 F.Supp. at 688), plaintiffs have no standing under New York law to litigate the state constitutional question in the New York courts. We are unimpressed by the proposal in the state's brief that we should abstain because "there is no assurance that that Court [i.e., Court of Appeals of New York] would not now reverse the position that it took in earlier cases . . ." in the light of the holding in *Flast v. Cohen*, 392 U.S. 83 (1967), that a federal taxpayer has standing to sue for constitutional violations. Nothing in the New York Court of Appeals' decisions since *Flast* encourages or supports the state's argument on this point.

II.

We come to the federal constitutional question. We are guided so clearly by the decision of the Supreme Court last term in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), that we need not review at length earlier cases which articulated constitutional limits on governmental assistance to church-supported schools. The boundaries of permissible government action in the field were set by *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968). In *Everson*, the Court upheld a New Jersey statute which reimbursed parents for bus fares of children attending parochial schools. However, the *Everson* Court cautioned that its decision carried to "the verge" of what Chief Justice Burger, in *Lemon*, described as the "forbidden territory under the Religion Clauses." In *Allen*, the Court found that a New York law under which the state loaned school books to students at parochial schools passed con-

Opinion of Lasker, D.J. and Hays, C.J.

stitutional muster. Neither case involved a statute which, as here, grants direct subsidies to parochial schools; and in *Lemon* the Court struck down two such plans.

The *Lemon-Earley* decision dealt with Pennsylvania and Rhode Island statutes which, as here, provided for cash payments intended to assist parochial schools in the acknowledgedly grave financial crisis which faces them. The Rhode Island statute, resting on a legislative finding that the quality of education available in nonpublic schools was jeopardized by rising salaries needed to attract teachers, authorized state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by direct limited payment to the teacher. The teacher was bound to teach only subjects and use only teaching materials offered in public schools, and not to teach any course in religion. Eligible schools were required to submit to the state financial data necessary to determine the propriety of payments under the Act. The Pennsylvania statute, also based on a legislative finding of rapidly rising costs in the state's nonpublic schools, authorized the Superintendent of Public Instruction to "purchase" "secular educational services" from nonpublic schools. The purchase was consummated by state reimbursement to nonpublic schools of actual expenses for teachers' salaries, text books and materials. To secure reimbursement, a school was required to follow specified accounting procedures subject to state audit. Reimbursement was limited to such secular courses as mathematics, foreign languages, physical science, and physical education, and prohibited courses that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

Opinion of Lasker, D.J. and Hays, C.J.

From this analysis it is apparent that the New York statute before us more closely resembles the Pennsylvania than the Rhode Island statute, and our decision is guided by the Supreme Court's observations as to the former. Indeed, the sole differences of substance which exist between the Pennsylvania statute and New York's mandated services law are that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing; and under the Pennsylvania statute a school was required, subject to audit, to account to the state, while here the school is not. We find these distinctions insufficient to avoid the rule of *Lemon-Earley*, concluding, as did the *Lemon* Court, "that the cumulative impact of the entire relationship arising under the statute[s] . . . involves excessive entanglement between government and religion."

The *Lemon* Court's finding of excessive entanglement was based on an examination of the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, *supra*, at 615.

In the case at hand there is no question as to the character and purposes of the institutions which are benefited. No dispute exists as to the close association of the schools to the religious institutions of various faiths which support them. Indeed, the record establishes that payments are made to schools which, for example, impose religious restrictions on admissions, require attendance of pupils at religious activities, and are an integral part of the religious mission of the supporting church.

Opinion of Lasker, D.J. and Hays, C.J.

The nature of the aid provided here is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Even before its holding in *Lemon* that such payments violated the establishment clause, the Court had cautioned in *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970):

“Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.”

The defendants here contend that the rationale of *Lemon-Earley* and the quoted *Walz* passage are inapplicable to the New York statute, which does not require, either on its face or as administered, any “detailed administrative relationship for enforcement” of the statute. It is said that, since the New York law simply does not require beneficiaries to report on their use of the funds, the vice foreseen in *Walz* and found fatal in *Lemon* does not exist here.

The argument is unpersuasive. As the *Lemon* Court commented:

“The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.” (at 621).

We think this lesson of history is applicable here. Indeed, the gentle inquiry of the Board of Regents which caused studies to be made to determine whether the costs to the

Opinion of Lasker, D.J. and Hays, C.J.

nonpublic schools for mandated services are actually as great as the amounts they receive from the state is a sort of inching in that direction. It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Indeed, section 8 of the statute itself states: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." It is difficult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now, to keep their shares of the apportioned moneys regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. The dilemma we have outlined is insoluble. Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Defendants argue that the strictures of *Lemon* and *Walz* against cash payments do not apply here because reimburse-

Opinion of Lasker, D.J. and Hays, C.J.

ment is being made for services which are "secular, neutral, or nonideological" (*Lemon*, at 616) analogous to the payments which were approved in *Everson* and *Allen*. The analogy, however, is inapposite. Bus transportation, school lunches, public health services, and secular text books (for which payment was approved in *Everson*, *Allen* and other cases) are of a character entirely different from services rendered by teachers in administering tests not only developed by the state, but those developed by the schools or the teachers. By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon*, "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* and *Allen* inapplicable. Nor does the fact that the reimbursement by New York is for "mandated services" rescue the statute. It is true, of course, that administration of tests, recording attendance of students, and compiling health records are required by the state, but so is teaching required by the state if a private school, parochial or otherwise, is to be certified as an adequate substitute for public school. It would be fanciful to suggest, however, that the state would be free to reimburse the schools for ordinary teaching expenses on the theory that the state "mandates" such services.

Even if all these observations were not true, the statute would nevertheless be constitutionally flawed. As the *Lemon-Earley* Court stated:

"A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." (at 622).

Opinion of Lasker, D.J. and Hays, C.J.

The Court held there that in a community with a large number of pupils served by church-related schools (surely true in the present case) it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation. The Court concluded (at 622) that "... political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Measured by this standard, the New York statute suffers precisely the same constitutional defects as both the Pennsylvania and Rhode Island statutes in *Lemon-Earley*.

While we thus conclude that Chapter 138 violates the establishment clause of the First Amendment, it is proper for us to note our sympathetic awareness of the serious financial problems directly facing the parochial schools and, indirectly, the public. We recognize and appreciate the contribution which private schools have made financially and in providing that variety of approach to education which enriches community life. But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star.

A permanent injunction against the enforcement of the statute will be granted. The defendants' motions are denied.

Submit order on notice.

Dated: New York, New York

April 27, 1972

/s/ PAUL R. HAYS, C.J.

/s/ MORRIS E. LASKER, D.J.

Dissenting Opinion of Palmieri, D.J.
Dated April 27, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE
SCHOOL, Rochester, New York, BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS
YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York,
and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

Before

HAYS, *Circuit Judge*,
PALMIERI and LASKER, *District Judges*.

PALMIERI, J.

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state

Dissenting Opinion of Palmieri, D.J.

to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.¹ It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

¹ This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

Dissenting Opinion of Palmieri, D.J.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U.S. 672, 678 (1971), that

"candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication"

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U.S. 644 (1970).² If, as the Supreme Court pointed out in *Allen*, *supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational func-

² This language is borrowed substantially from *P.O.A.U. v. Essex*, 28 Ohio State 2d 79 (1971).

Dissenting Opinion of Palmieri, D.J.

tion" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman and Earley v. DiCenso*, 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."

Accepting, as I believe we must, the basic premise that no perfect or absolute separation between religion and government is really possible, see *Walz v. Tax Commission of the City of New York, supra* at 670, I agree patly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State v. Oakey* (D. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

/s/ EDMUND L. PALMIERI

U.S.D.J.

Dated: April 27, 1972

Order and Judgment of Hays, C.J. and Lasker, D.J.
Entered June 1, 1972

IN THE
 UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF NEW YORK
 70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERNARD BACKER, ALGERNON D. BLACK, THEODORE
 BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA
 GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS,
 EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY,
 ALBERT SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York,
 and EWALD B. NYQUIST, as Commissioner of Education
 of the State of New York,

Defendants.

This action having come on to be heard on the merits
 before the Court, the Honorable Paul R. Hays, Circuit
 Judge, the Honorable Edmund L. Palmieri and the
 Honorable Morris E. Lasker, District Judges for the
 Southern District of New York, and after hearing argu-

Order and Judgment of Hays, C.J. and Lasker, D.J.

ments of counsel, the Court having rendered an opinion dated April 27, 1972, it is hereby

ORDERED AND ADJUDGED

1. That the defendants' motion to dismiss the complaint is denied.

2. Chapter 138 of the Laws of the State of New York of 1970 is hereby declared to be unconstitutional in violation of the First Amendment of the United States Constitution.

3. The defendants and their agents and all persons acting for or on behalf of the State of New York are permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

4. The order and judgment of the Court filed on the 19th day of May, 1972, is hereby vacated.

Dated: New York, New York
June 1, 1972

/s/ PAUL R. HAYS,
Circuit Judge

/s/ MORRIS E. LASKER,
District Judge

JUDGMENT ENTERED 6/1/72

/s/ JOHN LIVINGSTON

**Notice of Appeal of Cathedral Academy, St. Ambrose
School and Bishop Loughlin Memorial High School**

[FILED JUNE 30, 1972]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE
BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA
GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, ED-
WARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT
SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of
New York, and EWALD B. NYQUIST, as Commissioner of
Education of the State of New York,

Defendants,

—and—

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
GIRLS and YESHIVAH RAMBAM,

Intervenor-defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and Presi-
dent Pro Tem of the New York State Senate,

Intervenor-defendant.

Notice of Appeal of Cathedral Academy, et al.

SIRS:

Notice is hereby given that the above-named intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School hereby appeal to the Supreme Court of the United States from the Order and Judgment entered in this action on June 1, 1972 permanently enjoining the "defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, N. Y.

June 30, 1972

Yours, etc.

DAVIS POLK & WARDWELL

By PORTER R. CHANDLER /s/

A Member of the Firm

Attorneys for Intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School

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Tel.: HA 2-3400

Notice of Appeal of Cathedral Academy, et al.

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 LOUIS P. CONTIGUGLIA, Esqs.
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**Notice of Appeal of Bais Yaakov Academy for Girls
and Yeshivah Rambam**

[FILED JULY 11, 1972]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE
BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA
GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, ED-
WARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT
SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, as Governor of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of
New York, and EWALD B. NYQUIST, as Commissioner of
Education of the State of New York,

Defendants,

—and—

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
GIRLS and YESHIVAH RAMBAM,

Intervenor-defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and Presi-
dent Pro Tem of the New York State Senate,

Intervenor-defendant.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice of Appeal of Bais Yaakov Academy, etc. et al.

SIRS :

Notice is hereby given that the above-named intervenor-defendants Bais Yaakov Academy for Girls and Yeshivah Rambam hereby appeal to the Supreme Court of the United States from the Order and Judgment entered in this action on June 1, 1972 permanently enjoining the "defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York

July 7, 1972

Yours, etc.

JULIUS BERMAN and MARCEL WEBER, Esqs.

By JULIUS BERMAN /s/

Attorneys for Intervenor-defendants Bais Yaakov Academy for Girls and Yeshivah Rambam

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Notice of Appeal of Bais Yaakov Academy, etc. et al.

To:

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Chapter 138 of the 1970 Laws of New York**AN ACT**

To provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state pur-

Chapter 138 of the 1970 Laws of New York

poses are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such re-

Chapter 138 of the 1970 Laws of New York

duction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid

Chapter 138 of the 1970 Laws of New York

required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

Chapter 138 of the 1970 Laws of New York

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect September first, nineteen hundred seventy.

COPY

IN THE

Supreme Court of the United States

October Term, 1972

FILED

SEP 14 1972

MICHAEL RODAK, JR., CLERK

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education of
the State of New York,

and

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
GIRLS and YESHIVAH RAMBAM,

and

SENATOR EARL W. BRIDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BEN-
JAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER,
ABYEY NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD
M. SQUADRON,

Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

MOTION TO AFFIRM

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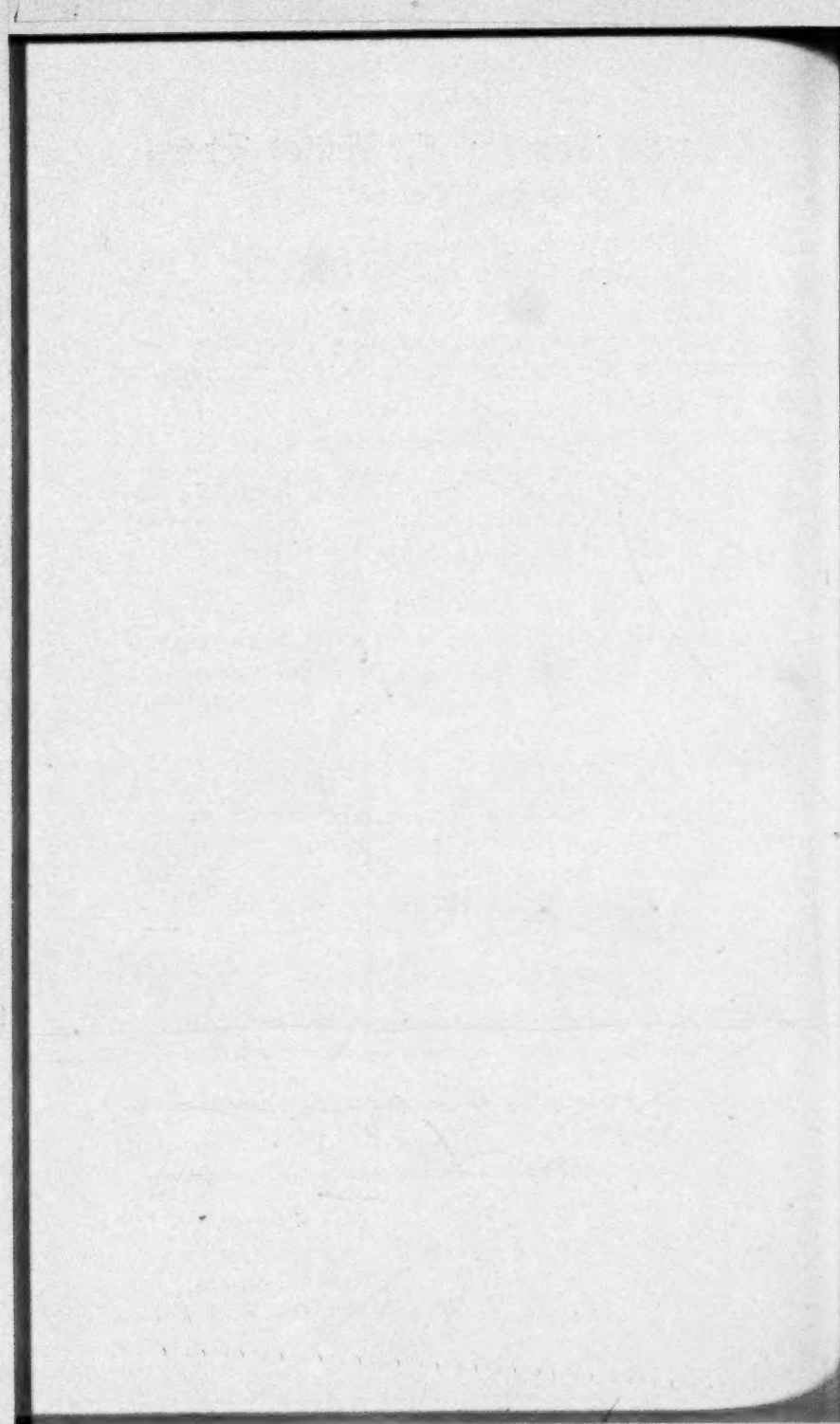


TABLE OF CONTENTS

	PAGE
Question Presented	2
Statement of the Case	2
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Case:

Lemon v. Kurtzman, 403 U.S. 602 (1971)	6, 7
--	------

Other Authorities:

Dystra, Sidney, <i>Mathematics Curriculum Guide</i> (1958)	4
La Noue, George R., "Religious Schools and 'Secular' Subjects", <i>Harvard Educational Review</i> (Vol. 32, pp. 272-275, 281) (Summer, 1962)	4
Sisters Mary St. William, Mary Emerentia, Mary Florence, et al., <i>New Way in Numbers</i> (1961)	4
Sister M. Paulita Campbell, <i>Progress in Arithmetic, Grade 4</i> (1957)	4

IN THE
Supreme Court of the United States

October Term, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York,
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CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
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ABYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD
M. SQUADRON,

Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the
appellees herein move to affirm the judgment of the court

below on the ground that the question upon which review is sought has been rendered so unsubstantial by the well-reasoned opinion of the District Court that no further review by this Court is necessary.

Question Presented

The question presented in this appeal is the constitutionality under the First Amendment of a state statute appropriating funds to be paid to nonpublic schools for expenses incurred in performing mandated services which are primarily examination and record keeping when the statute, as construed and applied by the state, includes as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.

Statement of the Case

The appellees accept the Statement of the Case as set forth by the appellants in their respective Jurisdictional Statements.

ARGUMENT

There is little we can add to the opinion of Judge Lasker. There is not much in the arguments in any of the three Jurisdictional Statements submitted herein which addresses itself to the reasons set forth by Judge Lasker for holding the statute unconstitutional and even less which meets these reasons. We therefore rely in the main on Judge Lasker's opinion for the argument in support of our motion to affirm. We do, however, wish to make one additional comment.

On page 18 of the New York Attorney General's Jurisdictional Statement, it is asserted that the State-required tests for which the statute provides reimbursement "are designed by the State and are the same tests provided by the State to public as well as nonpublic schools and thus are both secular and non-ideological in nature." This statement is not in accord with the facts. We respectfully call the Court's attention to page 24 of the State's Jurisdictional Statement wherein Judge Lasker shows that by the defendants' own admissions only a small part of the expenses for which money is received from the State covers the cost of services actually mandated by it. By far the greatest part of the money is used to pay for tests devised not by the State but by the schools and Diocesan authorities.* Thus, in a typical instance, the examination figure accepted by the State was \$68,853, but of this fully \$66,629, or 97%, represented the cost of school and Diocesan testing and less than 3% the cost of administering "tests provided

* This is admitted by the intervening schools' Jurisdictional Statement, p. 10, footnote 4.

by the State.” (Parenthetically, we note that in one case the State accepted as properly attributable to mandated services the sums of \$10,000 to maintain a convent and \$7,000 for Sisters’ transportation costs. Exhibit D of Answers to Interrogatories of Defendants Levitt and Nyquist, Mode I—pp. 16-17.)

Tests formulated and administered by church school authorities are not always “secular and non-ideological in nature.” A perceptive article by Professor George R. La Noue of Teachers College, entitled “‘Religious Schools and ‘Secular’ Subjects’” appearing in the Summer 1962 issue of *Harvard Educational Review* (Vol. 32, pp. 272-275, 281) shows how tests in even so value-free a subject as arithmetic can be used for religious indoctrination. The following examples come from three books published for use in church schools, two Catholic and one Protestant. (The books are: Sister M. Paulita Campbell, *Progress in Arithmetic, Grade 4* (1957); Sister Mary St. William, Sister Mary Emerentia, Sister Mary Florence, et al., *New Way in Numbers* (1961); Sidney Dystra, *Mathematics Curriculum Guide* (1958)):

How much money must I have to buy these four books? *Poems About the Christ Child*, \$1.85; *Story of Our Lady*, \$2.25; *Saint Joseph*, \$1.05; *Saint Theresa*, \$2.00.

The children of St. Francis School ransomed 125 pagan babies last year. This year they hope to increase this number by 20%. If they succeed, how many babies will they ransom this year?

David sells subscriptions to the *Catholic Digest* on a commission basis of 20%. If the subscription is \$2.50 a year, what is David’s commission on each sale?

China has a population of approximately 600,000,000. Through the efforts of missionaries 3,000,000 have been converted to Catholicism. What percentage of the people of China have been converted?

In Africa Father Murray, a Holy Ghost father, was given a triangular piece of ground upon which to build his church. What was the area of this ground if it had a base of 80 feet and an altitude of 120 feet?

* * *

Jim made the Way of the Cross. He likes the sixth station very much. What Roman numeral was written above it?

In millions of homes Our Lady's challenge has been accepted, but she wants billions throughout the world to join the Family Rosary for Peace. Do you know how to write in figures large numbers such as those just mentioned?

* * *

Why is it important to learn mathematics? Responses should relate to the idea that mathematics reveals God.

Why should a student's work be neat, accurate, and honest? Responses should relate to the idea that mathematics is a useful tool for work and service and must be done according to God's standards.

What would be the basis on which you would establish a business? Responses should relate to Christian ethics, stewardship, and usefulness.

How are number ideas used in making things? Responses should relate to mathematics as a tool for our creative activity.

How were mathematical ideas used in the creation of the world? Responses should relate to God the Creator and indicate the observation of form and order in creation.

Where does the idea of numbers come from? Responses should relate to God as the source of mathematical principles and of all knowledge.

What part did man play in revealing God through mathematics? Responses should deal with the history of the number system.

We do not know if these books are still in use in any church schools, or if they are, whether any teachers use the suggested tests and the suggested answers. But this we submit is constitutionally irrelevant, as is clear from the following quotation from the Court's opinion in *Lemon v. Kurtzman*, 403 U.S. 602 at 618-619 (1971):

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

• • •

A comprehensive, discriminating, continuing state surveillance will inevitably be required to insure that these restrictions are obeyed and the First Amendment

otherwise respected. . . . These prophylactic contracts will involve excessive and enduring entanglement between state and church.

This is exactly the situation in the present case. Even if it be assumed that a "comprehensive, discriminating, continuing state surveillance" would not be required in respect to external examinations such as those formulated by the State Board of Regents, the administration of these, as we have seen, makes up only a fraction of examination costs. Policing of school and Diocesan examinations is impossible without bringing on that "excessive and enduring entanglement between church and state" which the First Amendment forbids.

We do not mean to imply that the challenged statute would be constitutional if all the appropriated funds were allocated to the cost of administering State formulated examinations. For the reasons stated in Judge Lasker's opinion, that, too, would be unconstitutional. In addition, we would have a case of direct subsidization by the State of the necessary operations of church schools. As to this, the Court said in *Lemon*:

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. (403 U.S. at 621.)

Conclusion

The judgment of the District Court should be affirmed because its decision has rendered unsubstantial the question which the appellants ask this Court to review.

Respectfully submitted,

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New York, New York 10028

September, 1972

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-269, 72-270, 72-271

Supreme Court.
FILE

DEC 20 1

MICHAEL RODAK, J

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the State
of New York,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellees;

EARL W. BRYDGES, as Majority Leader and President
pro tem of the New York State Senate,

Appellant,

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellees;

CATHEDRAL ACADEMY *et al.*,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Filed August 18, 1972
Probable Jurisdiction Noted November 6, 1972

**BRIEF ON BEHALF OF APPELLANT,
EARL W. BRYDGES**

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTE INVOLVED	3
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT I—The mandated services aid to non- public schools is “secular, neutral and nonideologi- cal”	6
A. Summary of Provisions of the New York State “Mandated Services Act”	6
B. The “Mandated Services Act” Satisfies the Con- stitutional Standards of the First Amendment	7
1. The First Amendment Requires That Any Public Aid Program For Nonpublic Schools Maintain “Official Neutrality” Between Church and State	7
2. “Official Neutrality” Is Implicit In The His- torical Background Of The Mandated Serv- ices Act	11
(a) The Nature of Mandated Services—.....	11
(b) Constitutional Precedents for Mandated Services	16
(1) Federal Precedent	16

(2) New York State Precedent—Mandated Services Aid Is Expressly Authorized Under The “Blaine Amendment” of The New York State Constitution	17
3. “Official Neutrality” Is Observed In the Administration Of The Mandated Services Act	18
4. The Mandated Services Act Will Not Cause “Political Divisiveness”	19
5. The Mandated Services Act Will Not Foster A Trend Of Public Aid For Non-Public Schools	19
ARGUMENT II—The mandated services aid is necessary to avert a fiscal crises in financing education and other governmental services in New York State	21
ARGUMENT III—Legislative bodies and political institutions should not be curtailed in their constitutional right to a free and open debate of issues of a peculiarly volatile nature	26
CONCLUSION	30

Cases Cited

Abington v. Schempp, 374 U. S. 203 (1963).....	9
Americans United for Separation of Church and State v. Oakey, 339 F. Supp. 545 (D.C. Vt. 1972)	28
Auster, Matter of 198 Misc. 1055 (N. Y. Sup. Ct., Kings Co. 1950), aff'd. 278 App. Div. 784, aff'd. 302 N. Y. 855, appeal dismissed 342 U. S. 884 (1951)....	16
Board of Education v. Allen, 392 U. S. 236 (1968)....	8
Earley v. Di Censo, 403 U. S. 602 (1971).....	8, 17

TABLE OF CONTENTS

iii

	PAGE
Engel v. Vitale, 370 U. S. 421 (1962).....	9
Lemon v. Kurtzman, 403 U. S. 602 (1971).....	8, 9, 17-19, 27-30
Lemon v. Sloan, 341 F. Supp. 1356 (D.C. Pa. 1972)....	28
McCallum v. Board of Education, 333 U. S. 203 (1948)	9
Pierce v. Society of Sisters, 268 U. S. 510 (1925).....	16, 25
Plessy v. Ferguson, 1896	31
Robinson v. Di Censo, 403 U. S. 602 (1971).....	8
Walz v. Tax Commission, 397 U. S. 690 (1970).....	8-10, 16
Wolman v. Essex, 342 F. Supp. 399 (E. D. Ohio 1972)	28

United States Constitution Cited

Article IX	3, 30
Article X	3, 30
First Amendment	3, 4, 7, 9, 16, 27

New York Constitution Cited

Article VII, Section 10 (Blaine Amendment)	17
Article XI, Section 1	21
Article XI, Section 3	17

Statutes Cited

Laws of the State of New York, hereinafter referred
as to "Mandated Services Act" (1970):

Ch. 138	3, 4, 6, 7, 32
Sec. 1	7
Sec. 2	7

	PAGE
N. Y. Education Law:	
Sec. 6, Ch. 555, Tit. 1	7, 12
Sec. 305(2)	11, 12
Sec. 3204	11
Sec. 3210	11
Article 17	11
28 U.S.C.:	
Sec. 1254(1)	2
Sec. 2281	4
Sec. 2284	4

Rule Cited

Federal Rules of Civil Procedure:

24	4
----------	---

Other Authority Cited

Final Report of the President's Panel on Nonpublic Education (U. S. Gov. Print. Office, Stock No. 1780-1972):

pp. 28-29	30
-----------------	----

Kauper, "Government and Religion, the Search for Absolutes" (published in Michigan Law Quadrangle Notes, Vol. 15)

26

1972 Report of New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, Chapter V—Aid to Nonpublic Schools

23

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the State
of New York,

Appellants.

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellees;

EARL W. BRYDGES, as Majority Leader and President
pro tem of the New York State Senate,

Appellant,

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellees;

CATHEDRAL ACADEMY *et al.*,

Appellants.

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Filed August 18, 1972
Probable Jurisdiction Noted November 6, 1972

**BRIEF ON BEHALF OF APPELLANT,
EARL W. BRYDGES**

Appellant, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, submits this brief on his appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 1, 1972, which permanently enjoins payments under a 1970 law of New York State to nonpublic schools.

Opinion Below

The opinion of the District Court for the Southern District of New York, on the motion to convene a three-judge District Court, is reported in 322 F. Supp. 678 (S. D. N. Y. 1971).

The majority opinion of the District Court (342 F. Supp. 439) enjoining payments under the 1970 law of New York State and the dissenting opinion thereto (342 F. Supp. 445) are reported in 342 F. Supp. 439 (S. D. N. Y. 1972).

Jurisdiction

The judgment of the District Court enjoining payment of funds of the State of New York to nonpublic schools to reimburse them for a portion of expenses for complying with State-mandated attendance, reporting and educational requirements was entered on June 1, 1972 (See App. 94a). On August 18, 1972, Appellant, Senator Earl W. Brydges, filed his Jurisdictional Statement in this Court. On November 6, 1972, this Court noted probable jurisdiction. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Is there a violation of the First Amendment provisions of the U. S. Constitution, with respect to "Separation of Church and State", when a state statute grants limited state funds to nonpublic schools to alleviate part of the additional financial burden imposed on them by their compliance with certain state educational requirements mandating inspection and record-keeping and the examination of students attending nonpublic schools?
2. Does the "Establishment Clause" of the First Amendment of the U. S. Constitution, with respect to prohibiting laws establishing religion, stifle the will of democratic institutions to provide minimal assistance to nonpublic schools of a secular, nonideological and neutral nature?
3. Is there a violation of the First Amendment provisions of the U. S. Constitution, with respect to Freedom of Speech, and of Articles IX and X of the U. S. Constitution, with respect to the sovereignty of the individual and the several states, when the federal judiciary curtails the right of legislative bodies and political institutions to a free and open debate of issues of a peculiarly volatile nature?

Statute Involved

Chapter 138 of the 1970 Laws of the State of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor" (See App. 93a).

Statement

Appellant, Senator Earl W. Brydges is the Majority Leader and President Pro Tem of the New York State Senate.

Appellants, Levitt and Nyquist are, respectively, Comptroller and Commissioner of Education of the State of New York. Appellants, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam are nonpublic elementary and/or secondary schools situated in the State of New York.

Appellees, allegedly taxpayers of New York State, instituted this suit on July 30, 1970 in the United States District Court for the Southern District of New York, praying, *inter alia*, that appellants Levitt and Nyquist be permanently enjoined from approving or paying any funds of the State of New York pursuant to Chapter 138 of the 1970 Laws of New York (See App. 93a), hereinafter referred to as "Mandated Services Act", to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit or give preference in admission or employment to persons of a particular religious faith. Appellants, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam, as beneficiaries under the Mandated Services Act, duly intervened in the suit as parties defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure (FRCivP). A three-judge District Court consisting of the Hon. Paul R. Hays, U. S. Circuit Judge, Hon. Edmund L. Palmieri and Hon. Morris E. Lasker, U. S. District Judges, was duly constituted on February 24, 1971 pursuant to 28 U.S.C. §§2281, 2284. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion (342 F. Supp. 439), concurred in by Judge Hays, that the Mandated Services Act "violates the establishment clause of the First Amendment." The Court reasoned in part, as follows:

"Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen."

Judge Palmieri dissented (342 F. Supp. 445) on the ground, among others, that

"[t]he record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions."

On June 1, 1972, judgment was entered (See App. 94a) permanently enjoining the

"defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools."

Appellant, Senator Earl W. Brydges was permitted to intervene as a party defendant in this suit pursuant to Rule 24, FR Civ P, subsequent to entry of judgment (App. 113a).

Summary of Argument

Allocation of public funds to reimburse nonpublic schools for a portion of expenses for complying with State-mandated attendance and reporting requirements and

for evaluation of student performance are clearly within the meaning of "secular, neutral and nonideological" aid, which this Court has recognized as constitutional. The record below is uncontested that the public aid appropriated for such expenses is less than the schools expend for complying with New York State educational requirements, thus assuring that the public funds are not available for religious purposes. The original purpose for enactment of this legislation was to assure, through examination and inspection, that children are attending nonpublic schools and maintaining levels of achievement in accordance with the long-standing tradition of the State's education laws. This legislation, moreover, has taken on the added dimension of being essential to avert a fiscal crisis in nonpublic schools because of staggering increases in educational costs in the last few years. Any precipitous closings of financially hardpressed nonpublic schools would result in catastrophic consequences to the already overcrowded public schools and the State's financing of other governmental services. State legislatures should not be foreclosed from enacting programs of nonpublic school aid, though such legislative action might engender some "political divisiveness."

ARGUMENT I

The mandated services aid to nonpublic schools is "secular, neutral and nonideological".

A. Summary of Provisions of the New York State "Mandated Services Act"

Chapter 138 of the 1970 New York State Law, the "Mandated Services Act", authorizes \$28,000,000¹ to be

¹ Declining enrollment has reduced the actual payments to \$24 million, or less, annually.

paid to nonpublic schools as partial reimbursement for expenses incurred for services mandated or necessarily required by state law or regulation of the State Commissioner of Education. These services¹ are intended . . . "to assure, through examination and inspection and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities."² Minimum state educational standards have been required of public and nonpublic schools alike in New York State for over a century.³

B. The "Mandated Services Act" Satisfies the Constitutional Standards of the First Amendment

1. *The First Amendment Requires That Any Public Aid Program For Nonpublic Schools Maintain "Official Neutrality" Between Church and State.*

The constitutional standards that any program of nonpublic school aid must satisfy are stated most succinctly in the decision of this Court of June 28, 1971 in *Lemon v.*

¹" . . . examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations; maintenance of records of pupil enrollment and reporting thereon; maintenance of pupil health records; recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation" (§2, Chapter 138 of the Laws of 1970).

²Section 1, *Id.*, legislative findings.

³See, N. Y. Consolidated School Law, Chap. 555, Laws of 1864.

Kurtzman; Earley v. Di Censo and *Robinson v. Di Censo*, 403 U. S. 602 (1971). The standards are stated in terms of three "cumulative criteria": First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citing the textbook case of *Board of Education v. Allen*, 392 U. S. 236 (1968)]; finally the statute must not foster 'an excessive government entanglement with religion' [citing the tax exemption case of *Walz v. Tax Commission*, 397 U. S. 690 (1970)]."

The June 28, 1971 Opinions of this Court do not contain—indeed they disavow—any neat formula for determining the line of unconstitutionality of this area of public aid to church-related education. Conclusions must be based, therefore, on this Court's analysis of nonpublic school and religious aid programs in prior opinions, the language and spirit of those opinions, and the explanations given of related precedents.

Despite the formidable task and the divergent views entailed in such an analysis, it is significant that this Court over the past quarter century has sustained rather consistently public aid to relieve the financial burden on religious institutions, which could not otherwise survive without such aid. Such aid has taken the form of transportation aid (*Everson v. Board of Education*, supra), and textbook aid (*Board of Education v. Allen*, supra), both of which assist the nonpublic schools in fulfilling their avowed religious mission. Financial relief for religious institutions has also been recognized as a legitimate public function in the form of tax exemptions for church-owned property (*Walz v. Tax Commission*, supra).

In contrast to this framework of constitutional aid programs, this Court has rejected programs which involve public assistance for the actual "instruction" of students.

Unconstitutional are programs for reimbursement of teachers' salaries for "secular educational services" (*Lemon v. Kurtzman*, supra). Also, programs of primarily an ideological nature to advance religious teaching in public schools, such as released-time religious education in the public schools (*McCallum v. Board of Education*, 333 U. S. 203 (1948)), or the recitation of school prayers in public schools (*Engel v. Vitale*, 370 U. S. 421 (1962)) and even the daily reading from the Bible, without comment or prayer. (*Abington v. Schempp*, 374 U. S. 203 (1963)).

The foregoing analysis of this Court's decisions reflects certain basic policies in the religion clauses of the Constitution. Financial aid to religious institutions is not, per se, an abridgement of the Separation of Church & State Doctrine of the First Amendment of the Constitution. Rather, the abridgement occurs when any government program impairs an individual's right to voluntarily exercise his religious beliefs or if the State acts to advance a particular religious belief.

The basic principle, therefore, which the religious clause of the First Amendment is intended to protect, may be succinctly stated as "official neutrality"—avoidance of undue involvement of the churches in the state and of the state in the churches. As was observed by Justice Harlan, concurring in *Walz v. Tax Commission*, supra at 694:

"... I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application. What is at stake as a matter of policy is preventing that kind and degree of government

involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point. Two requirements frequently articulated and applied in our cases for achieving this goal are 'neutrality' and 'voluntarism' [citing Goldberg, J., in the *Schempp* case, *supra* at 305 and *Engel v. Vitale*, *supra*.] These related and mutually reinforcing concepts are short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor try to encourage participation in or abnegation of religion."

As gleaned from the above authorities, these two concepts, which are at the core of the Religion Clauses, must be observed by political institutions so as to avoid the . . . "risk of politicizing religion" (*Walz v. Tax Commission*, *supra*, opinion J. Harlan, at 695.); or in other words, "excessive entanglement" between Religion and the State.

To be sure, the concepts "neutrality", "voluntarism" and "excessive entanglement" are like a prism, through which an object may take on different appearances depending on how the prism is held to the eye of the observer. It is submitted, however, that when viewed in proper perspective, these concepts require that a nonpublic school aid program, to pass constitutional muster, should insure that the State maintains "official neutrality" from the religious sector.

When analyzed in the light of this framework of Constitutional authority, New York State's Mandated Services Act of 1970 satisfies this Court's concern for "official neutrality".¹

¹ Plainly, this expression is employed, not to suggest that this Court should fashion any new test of constitutionality, but to highlight important aspects of the "purpose," "effect" and "entanglement" tests.

2. *"Official Neutrality" Is Implicit In The Historical Background Of The Mandated Services Act.*

(a) *The Nature of Mandated Services—*

For more than a century the nonpublic schools in New York State have been required by law to comply with certain minimum educational and health standards, record keeping and enrollment procedures. These requirements have been imposed consistently on all elementary and secondary schools, both public and nonpublic alike, by various sections of the Education Law. For example, the provisions of Article 17 of the Education Law require certain subjects to be taught in nonpublic as well as public schools;¹ and most notably the provisions of Sections 3204 and 3210 thereof, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to that of the public schools of the district of location of the nonpublic school and of the district of residence of the student.² Furthermore, subdivision 2 of Sec-

¹ The provisions of this Article, many of which predate the Twentieth Century, require all elementary and secondary schools of the state to instruct in such subjects as patriotism, citizenship, historic documents, the flag, holidays, physical education, alcohol, drugs, highway, traffic and fire safety, humane treatment of animals, firearms and wildlife.

² See, "N. Y. Education Law, §3204. Instruction required", which provides in part—"1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this Article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

"2. Quality and language of instruction; text-books. * * *

Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the in-

(Footnote continued on following page)

tion 305 of the Education Law, which provides for the general powers and duties of the Commissioner of Education, states that he shall have general supervision over all schools and institutions which are subject to the provisions of the Education Law or any other statute relating to education and that he must cause all these schools to be examined and inspected.¹

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the State Education Department, such as the Regents examinations, the so called "PEP Tests" (Pupil Evaluation Program) in grades 3, 6, and 9, as well as other testing devices, which require the results of such

(Footnote continued from preceding page)

struction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

• • •

- "3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York State and science. (2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States."

¹ The New York State Commissioner of Education predicates his jurisdiction over the nonpublic schools on this statutory authority, which was originally derived from N. Y. Consolidated School Law, Ch. 555, Title 1, §6, Laws of 1864. See, App. 86a.

tests to be reported to the Education Department.¹ In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of making sure that the minimum State educational standards are maintained throughout all the schools in the State.²

¹ Answers to Interrogatories of N. Y. State Commissioner of Education (See, App. 85a).

² The variety of evaluation and reporting services required of nonpublic schools was certified by the N. Y. State Commissioner of Education (See, App. 85a) as follows:

What They Do

- 1) PEP testing.
- 2) Regents examinations for those schools offering a Regents diploma, plus equivalent examinations for such areas in which Regents exams are not offered.
- 3) Periodic examinations for the evaluation of the progress of students.
- 4) Transfer records certifying grade record.
- 5) Health records for transfers.
- 6) Basic Educational Data System.

Every nonpublic school known to the Education Department is required each fall to file a statistical report entitled "Basic Educational Data System—Report of Nonpublic Schools" (copy attached). This report includes various kinds of information including:

- a) Counts of full and part-time professional staff in four categories (principal, supervisors and department heads, classroom teachers, other instructional staff);
- b) Pupil enrollment by grade and within ethnic categories;

(Footnote continued on following page)

(Footnote continued from preceding page)

- c) Times of daily operation by grade;
 - d) Number and distribution of graduates in the previous June (secondary schools);
 - e) Number of dropouts;
 - f) Age of main building and major additions;
 - g) Number and types of instructional rooms;
 - h) Curricula offered;
 - i) Incidence of special instructional procedures such as programmed instruction, simulation or gaining, multi-media instruction, etc.;
 - j) Participation in specially funded projects such as those under ESEA Title I.
- 7) Data from Registered Nonpublic Secondary Schools.

Every registered nonpublic secondary school is required to file each fall with the Bureau of Secondary School Supervision a form entitled "Secondary School Report" (copy attached) which includes the following additional kinds of data:

- a) Number of days in session and school calendar information;
- b) Number of graduates qualified for Regents diplomas (previous June) and distribution of graduates by major three-year sequence;
- c) Class size and average daily pupil load data;
- d) Names, titles and salaries of administrative and supervisory personnel;
- e) Counts of ancillary staff such as librarians, guidance counselors, psychologists, nurses, etc.;
- f) Counts of professional staff qualified and not qualified for State certification;

(Footnote continued on following page)

As noted by the New York State Commissioner of Education,

"... [A]ll the services rendered by nonpublic schools in connection with the maintenance of said minimum State standards are 'provided for or required by law or regulation'."³

(Footnote continued from preceding page)

- g) Counts of nonprofessional staff;
 - h) Tuition charges;
 - i) Subject and unit requirements for graduation;
 - j) Standardized tests employed;
 - k) Types of audio-visual equipment.
- 8) Health service records.
 - 9) Examinations for students not qualifying for a Regents diploma and filed for one year for inspection.
 - 10) Attendance records.
 - 11) A future development should be more comprehensive expenditure information and inspectorial information on nonpublic schools. The present funding for the performance of such services is not adequate to cover this area.
 - 12) A future requirement will be to collect personnel characteristics for this system.

³ Answer to Interrogatories of N. Y. State Commissioner of Education (App. 87a).

(b) **Constitutional Precedents for Mandated Services.**

(1) **Federal Precedent**

This Court a half century ago recognized the right of the individual states of the Union to impose minimum standards on the operation and educational quality of non-public schools, (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925) at 534¹. As already observed, New York State has a long-standing tradition in requiring such reporting procedures and testing devices. This tradition, coupled with the broad generality of educational institutions that must comply with these requirements, are important factors which this Court found significant in upholding tax exemptions for religious and other charitable institutions in the *Walz Case*, *supra*, at 681:

"The more long-standing and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation."

¹ This conclusion is implicit in the Court's opinion that "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." Also, *Matter of Auster*, 198 Misc. 1055, (N. Y. Sup. Ct., Kings Co. 1950), *aff'd* 278 App. Div. 784, *aff'd* 302 N. Y. 855, appeal dismissed 342 U. S. 884 (1951) where the court held that State education laws requiring the teaching of secular subjects in religious schools did not violate the First Amendment.

This historical pattern mutes any charge that the Mandated Services Act is without Constitutional basis.

(2) New York State Precedent—

Mandated Services Aid Is Expressly Authorized Under The "Blaine Amendment" of The New York State Constitution

The so-called "Blaine Amendment", Article XI, Section 3, of the New York State Constitution, is often cited as authority for prohibiting the expenditure of public funds in aid of denominational schools. It expressly authorizes such aid, however, . . . "for examination or inspection" . . . of such schools. These provisions have been a part of the New York State Constitution for over a century and a half.¹

As noted by Justice Brennan in his concurring opinion in *Lemon v. Kurtzman* and *Earley v. Di Censo*, *supra* at 645-650, it is a well known fact that the history and Constitutional policy expressed in the Establishment Clause of the First Amendment is identical with that of the almost universal State Constitutional provisions, of which Article XI, Section 3 of the New York State Constitution is one example.

It is obvious, from this analysis of New York State's "Blaine Amendment" that New York's tradition of requiring examinations of the activities of nonpublic schools has a long-standing and firm Constitutional basis. Certainly, when viewed in the light of the State's century-old concern that children attending nonpublic schools obtain a quality education, the Blaine Amendment, rather than pro-

¹ N. Y. Const. 1821, Art. VII, §10.

hibiting or even being silent on the question of expenditure of public funds for such purposes, expressly authorizes such aid.

3. "Official Neutrality" Is Observed In the Administration Of The Mandated Services Act.

The functions of reporting, taking attendance and evaluation of a student's performance are by their very nature neutral. Who can logically cast the persuasion that taking enrollment and administering State Regents examinations and other tests excessively entangles the public sector in religious activities? The State's long-standing statutory tradition to insure quality education for all children in the State can only be assured if proper reporting and evaluation programs are administered in every school. Quite properly, reimbursement for the performance of such services by the nonpublic schools is but a logical extension of this long-standing tradition to insure quality education in the nonpublic schools. Just as public funds are presently available for transportation, school lunches and health services for nonpublic school children to assure their physical well-being in attending school, so should public funds be available to evaluate the intellectual well-being of students in such schools.

Evaluation of student performance, attendance, record keeping, etc. are services clearly distinguishable from instructing students and certainly not fraught with the dangers of excessive entanglement which this Court found in programs to reimburse secular instruction (*Lemon v. Kurtzman, supra*). Administration of any program to reimburse teachers for instructing students in secular courses necessarily entails close public surveillance of the religious institutions and the very teaching process itself, in order to reimburse the schools for just "secular" and

not "religious" teaching. The obvious danger in such a course of action is that the State might dictate the character of instructions in the parochial schools.

In sharp contrast, the administration of the Mandated Services program is by its very nature impersonal and objective. The religious persuasion of an individual in no way diminishes the neutrality of taking attendance, administering examinations or compiling records.

4. *The Mandated Services Act Will Not Cause "Political Divisiveness".*

Any concern that this ongoing program of Mandated Services Aid might produce "political divisiveness" is certainly dispelled by the fact that the reimburseable services have been a part of our educational program, both public and non-public alike, for many years. Moreover, it is significant that since the inception of this program there have been no efforts to expand upon the amount of the reimburseable payments nor has there been any political debate of any consequence over this program, either when it was initially enacted in 1970 or in the successive years when the Legislature has repeatedly voted overwhelmingly to fund this program for the same amount.

5. *The Mandated Services Act Will Not Foster A Trend Of Public Aid for Nonpublic Schools.*

The decision of this Court in *Lemon* demonstrates this Court's concern for ongoing educational programs which could jeopardize the state's neutrality with respect to religion. Certainly if limited public funds are syphoned-off to support the nonpublic schools, there is legitimate concern as to whether the government can maintain a neutral

role if it substantially subsidizes institutions whose secondary goal is to inculcate religious dogma. No such danger exists, however, under the New York State Mandated Services Act. The legislation is limited in scope, amount and impact.

The amount payable to each school for such services is limited to 25¢ a day per student and only 15¢ a day for students in grades one through six. The reimburseable services are limited to expenses incurred in reporting attendance and evaluation of student performance. The interrogatories of the Education Department, which are part of the record, demonstrate that the total cost for such services in all non-public schools in the State exceeds the reimbursement provided under this act.¹

However, the Education Department has concluded that any attempt to project substantially higher appropriations would require further research and data reliability beyond which the present appropriation is based (See App. 85a).

The action of the Legislature in maintaining this appropriation at a constant level since the inception of the program and in devising other programs, rather than expanding mandated services, to aid nonpublic schools clearly establishes that the Legislature recognizes that the parameters of this program have been drawn and are limited to \$28,000,000.

¹ A cost analysis for mandated services was performed by three research Consultants engaged by the New York State Education Department in 1970 (See App. 85a). Operating independently, the Consultants reported findings which substantiate that the \$28 million appropriated to reimburse the nonpublic schools for providing reporting and evaluation services is less than the actual costs of such services. Also, see finding of Justice Palmieri, dissenting in this case (342 F. Supp. 445).

Obviously, this minimal amount of aid, in relation to the total amount of State aid for education each year—2.5 Billion dollars—, is limited in its impact on individual schools. Fifteen cents or 25¢ a day per pupil is scarcely an incentive to the opening of additional nonpublic schools. Moreover, the amount of aid is probably too little and too late to reverse the inexorable trend of school closing which has been prompted in the last few years by spiralling costs of education. The key to this legislation, however, is that it could prevent a precipitous closing of nonpublic schools. With this aid the trend would be at a pace consistent with the ability of the public schools to more readily absorb the nonpublic school children.

ARGUMENT II

The mandated services aid is necessary to avert a fiscal crisis in financing education and other governmental services in New York State.

During the 1970-71-72 legislative sessions, the New York State Legislature devoted particular attention to a matter of vital importance to every citizen in the State of New York—how to finance a quality education for every child in the State.

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for "... the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about \$2.5 billion in 1972-73, an increase of almost \$500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated, nonpublic schools at practically no cost to the taxpayer. Greatly increased costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels, including education, threaten a precipitous collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often characterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The Table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that would be available to support an influx of nonpublic students into the public schools.

PROPERTY TAX REVENUE REMAINING UNDER CONSTITUTIONAL
LIMITS FOR THE SUPPORT OF EDUCATION IN SELECTED CITIES¹

<i>City</i>	<i>1971-72 Property Tax Margin Remaining</i>	<i>1970-71 Nonpublic Enrollment</i>	<i>Amount available per pupil at local level if all nonpublic pupils were transferred to public schools</i>
Auburn	\$ 254,122	1,709	\$148.69
Binghamton	175,826	2,505	70.19
Buffalo	5,528,877	32,353	170.89
Jamestown	36,826	535	68.83
New York	1,400,187	399,615	3.50
Niagara Falls	1,118	3,430	.32
Rochester	2,835,858	14,986	189.23
Syracuse	3,798	9,640	.39
Troy	896,628	3,325	269.66
Utica	664,116	5,402	122.93
Yonkers	—0—	9,946	—0—

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of \$750 per pupil) would be well-nigh impossible

¹ Table and informational data in this Argument II are derived from 1972 Report of New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, Chapter V—Aid to Nonpublic Schools.

if these students should transfer in any substantial numbers. In fact, the Table demonstrates that even a small number of transfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately \$1400 per year. Indeed we could argue that the magnitude of that expenditure—the highest in the national—was made possibly only by the willingness of the parents of nonpublic school children to bear an enormous tuition burden for the education of almost 750,000 children in addition to their normal tax load. Of course, the presumption here is that tax dollars are limited; and thus, the fewer the pupils, the more that can be spent on a per pupil basis for public education. This presumption is real and the financial crises that would be precipitated by attempting to maintain the present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over \$1 billion additional annual operating cost that would be necessary, and the estimated \$1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children.

The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is \$600,000,000 more than the entire revenue currently generated by the State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its current budget on *anticipated* Federal revenue sharing of \$400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer is obvious. Survival of quality education is at stake.

No one will deny New York's constitutional authority to mandate certain minimal services, tests, record-keeping, health services, attendance requirements and the like in the nonpublic schools within its borders. It has done so for many years without challenge and without cost to the taxpayer.¹

In recent years, due to inflation, labor costs and the overall increased costs of producing quality educational services in the nonpublic schools, these schools were no longer able to financially comply with the additional costs of providing for the State the required reporting and record-keeping of these mandated services. Because of this increased financial burden imposed by the State, many nonpublic schools had begun to reach the breaking point and were about to be forced to close their doors.

The Legislature, recognizing the impending calamity it was faced with, had the choices of either letting the nonpublic schools close, or eliminating the programs of mandated services, or assisting the nonpublic schools financially for their out-of-pocket expenses incurred in complying with these State mandates. The Legislature chose the latter course.

It seems anomalous to say that the Legislature can direct these private nonpublic schools to perform certain services for the State but not be able, constitutionally, to reimburse them partially for the costs of performing these services. Yet that is the substance of the decision below. Indeed, it would appear to be more of a constitutional deprivation for the State to mandate these services

¹ This Court a half century ago recognized the right of the individual states of the Union to impose minimum standards of educational quality and operation on the nonpublic schools. (*Pierce v. Society of Sisters*, supra, at 534).

by private institutions without just compensation rather than for the State to reimburse them for these services.

This Court would do well to heed the advice of Professor Paul Kauper, an eminent constitutional lawyer, who concluded his lecture on "Government and Religion, the Search for Absolutes" (published in *Michigan Law Quadrangle Notes*, Vol. 15), as follows:

"In short, the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom in these matters; that there is latitude for some play in the joints; and that in the area of church-state relations as in all other areas of public concern where policy considerations loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process."

Perhaps, the time has arrived for the resuscitation of the doctrine of "judicial self-restraint" in this area of the law, in order to leave room for states to experiment with devising more effective methods of educational achievement which is more apt to arise through competition between schools rather than by elimination of the nonpublic schools from the scene.

ARGUMENT III

Legislative bodies and political institutions should not be curtailed in their constitutional right to a free and open debate of issues of a peculiarly volatile nature.

The exercise of such fundamental rights as Freedom of Speech and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue, no matter how politically divisive it may be on segments of our society.

The exercise of this right appears to have been curtailed by recent federal court decisions involving issues similar to those in this lawsuit. Those decisions have expressly, and by innuendo, curtailed the rights of state legislative bodies to freely and openly debate issues which are "potentially divisive." The basis of these federal court decisions is the opinion of this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In that case it was observed that:

"Ordinarily, political debate and division, however vigorous or even partisan, are normal manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

"The potential divisiveness of such conflict is a threat to the normal political process."

This Court issued this pronouncement in declaring unconstitutional a Pennsylvania law providing public funds for teaching nonreligious courses in private schools. In so ruling the Court acknowledged its chief concern was not whether the law aided religion, but that it involved "excessive entanglement" of religion in government. Such entanglement, this Court concluded, violated the First Amendment provision of separation of church and state. This Court implied that excessive entanglement exists in the normal political activity of our legislative bodies when considering issues which peripherally touch upon a religious question.

This Court's reaction to entanglement of religion and government cannot be taken as a "passing fancy." In recent months other Federal courts have relied upon the pronouncement in the *Lemon* case to curtail efforts by various legislative bodies throughout the country to seek solutions to the fiscal plight of nonpublic schools.

For example, in March 1972 a three-judge Federal Court declared unconstitutional a Vermont law which partially reimbursed public school teachers for teaching nonreligious courses in parochial schools. (*Americans United for Separation of Church and State v. Oakey*, 339 F. Supp. 545 (D.C. Vt. 1972). The court noted (at 545):

"Any such involvement carries with it the explosive potential for citizen friction and political subdivision along religious lines."

Similar restrictions on the freedom of state legislatures to debate issues involving religious overtones was evidenced in the month of March 1972 when federal courts sitting in Pennsylvania and Ohio struck down laws reimbursing parents for children's tuition payments in private schools. (See *Lemon v. Sloan*, 341 F. Supp. 1356 (D.C. Pa. 1972); *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio 1972)). Particularly significant is the decision of the federal court in Ohio, which states, in part, that the plan

"... contains the seeds for increased political involvement along religious lines at every level of government. . . . To uphold this statute would be to introduce the religious issue to the very center of state politics . . . the political issue will be an expansive one . . . with the result that the issue will be joined along sharply drawn religious lines."

The two judges of the Federal District Court in this case have likewise implied that restrictions are imposed

on the freedom of the state legislature to debate legislation touching on religious issues. The majority decision noted (342 F. Supp. 439):

“... it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents.”

The pronouncement of this Court in the *Lemon* case, as applied in this line of recent Federal cases, has been resorted to with devastating consequences. Underway is a dangerous trend to restrict the freedom historically enjoyed by the New York State Legislature and other legislative bodies to respond to diverse problems, which by necessity demands free and open discussion of every conceivable issue. As noted by Judge Edmund L. Palmieri in his dissent in this case:

[Government and political activity should play a part in searching] “... for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world.”

In the event that this trend to curtail legislative debate is continued, no longer will legislative bodies operate as a forum for free and open discussion. Indeed there is a danger that the resolution of peculiarly volatile issues will no longer continue within the framework of our democratic process. It is submitted that the unfortunate trend that may develop from these recent federal court decisions is to encourage elements of our society to seek

solutions to our social, political and economic problems in a manner that is "extra-legal."

The courts of the United States have attempted to exercise a jurisdiction so large and so great in terms of breadth and width that sometimes members of the judiciary lose track of the fact that the Federal Government is not the paramount body in the United States of America. In the Federal Government and its Judiciary does not repose the sovereignty, except to the extent that the states have given it to them. The sovereignty of the individual and of the states under the reserved powers concept (U. S. Constitution Articles IX and X) reposes not there but with the states, and the fact that the states do have this residuum of sovereignty makes theirs the responsibility of preserving that which remains.

It is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its debate. In giving birth to our Federation, the several states allowed and authorized the courts of the United States to pass upon the constitutional issues of the final product, the statutes which are enacted. But no where can be found the authority for the courts to dictate that which would be the subject of colloquy.

CONCLUSION

The Final Report of the President's Panel on Nonpublic Education (U.S. Gov. Print. Office, Stock No. 1780-1972) made the following pertinent observations, at pages 28-29, concerning this Court's decision in *Lemon v. Kurtzman*:

"In the Panel's view the full Court had an inadequate perception of realities in parochial schools

because it failed to pierce the institutional veil. The entire focus was on the powers of the hierarchy, the role of the pastors, and the teaching commitment of religious; ignored were parents, teachers, and pupils who are now cut off from certain forms of public assistance.

"Others have launched sharper critiques. One such criticism holds that, by judicial fiat, there is now a virtual disenfranchisement of religiously committed people with respect to public policy questions about which their churches have a strong position. They ask whether the civil rights of Lutherans or Jews or Quakers are to be suppressed under the guise of 'no religious division' in the same way that the Civil rights of Negroes were curtailed by a Supreme Court ruling (*Plessy v. Ferguson*, 1896) that 'separate but equal' treatment was necessary for peace and order. Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to non-public school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted.

"Whatever legal opinions are involved, the Panel shares Mr. Justice White's minority statement that not only has the majority decision ignored the evidence in the Rhode Island case ('on this record there is no indication that entanglement difficulties will accompany the salary supplement program') but that—

"The Court thus creates an insoluble paradox for the State and parochial schools. The State

cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.'

"Repercussions from this decision have been many. Michigan, Connecticut, and Ohio had plans to use State funds for teacher salary supplements, which have now been thwarted; plans for purchase of secular educational services in Illinois and New York have similarly fallen. Still to be decided are Maryland's scholarship plan, tax credit plans in Minnesota and Hawaii, and Illinois' multiple approach, which includes tuition vouchers for inner-city non-public school pupils.

"In summary, the law is still being molded and shaped by both judicial philosophies and political events so that the final phase in the Federal drama over nonpublic school education is still to be enacted."

It is submitted that Chapter 138 of the 1970 Laws of New York is such a constitutional enactment, consistent with and in response to the guidelines set forth by this Court and the United States Constitution.

We contend that the majority decision of the District Court in this case fails to recognize the authority of the several states, under our Federal System, to legislate with respect to nonpublic school education. Accordingly the

judgment of the District Court should be reversed and
Plaintiffs' complaint dismissed on the merits.

Dated: December 15, 1972.

Respectfully submitted,

JOHN F. HAGGERTY

LOUIS P. CONTIGUGLIA

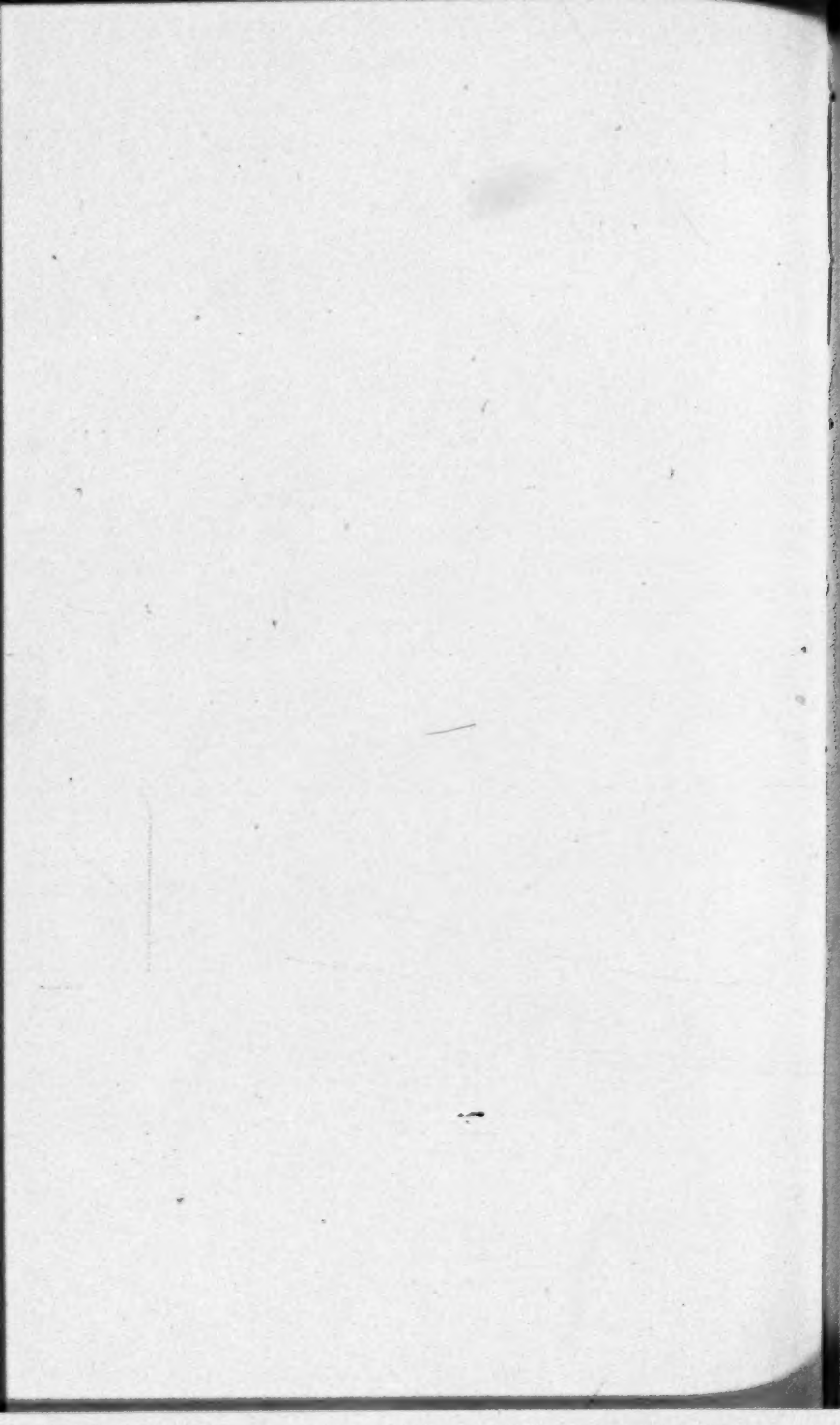
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IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the
State of New York,

and

Appellants,

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL,
Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH
SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR
GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn,
New York,

and

Appellants,

EARL W. BRYDGES, as Majority Leader and President Pro Tem
of the New York State Senate,

against

Appellant,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
HOWARD SQUADRON,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS LEVITT AND NYQUIST

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TABLE OF CONTENTS.

	PAGE
Citations to Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Question Presented for Review	5
Statement of the Case	5
Summary of Argument	13
Argument	15
The compensation of nonpublic schools for secular non-teaching services rendered to the State in com- pliance with State law and regulations does not con- stitute an establishment of religion	15
A. Factually, the New York Legislature's intent in enacting Chapter 138 was to compensate schools for providing required information to the State, concerning compliance with the State's Educa- tion Law by nonpublic schools	15
B. The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examina- tion, record keeping, and reporting requirements does not constitute an establishment of religion in the historical context of the First Amendment	21
C. The payment to nonpublic schools, both sec- tarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examina- tion, record keeping, and reporting requirements does not constitute an establishment of religion as defined by the decisions of this Court, but is rather a constitutional use of State funds for State purposes	26
Conclusion	39
Appendix A—Chapter 138 of New York Laws of 1970	A1

II.

CASES.

	PAGE
<i>Abington School District v. Schempp</i> , 374 U. S. 203 (1963)	21
<i>Board of Education v. Allen</i> , 392 U. S. 236 (1968) ..	35, 36, 37
<i>Cochran v. Board of Education</i> , 281 U. S. 370 (1930) ..	35
<i>Committee for Public Education and Religious Liberty, et al. v. Rockefeller, et al.</i> , 322 F. Supp. 678 (1971) ..	6
<i>Earley v. DiCenso</i> , 403 U. S. 602 (1971)	11
<i>Everson v. Board of Education</i> , 330 U. S. 1 (1947) ..	21, 22, 26, 27, 28
<i>Lemon v. Kurtzman</i> , 403 U. S. 602 (1971)	11, 21, 30, 31, 32, 34, 35
<i>McCullum v. Board of Education</i> , 333 U. S. 203 (1948) ..	23
<i>McGowan v. Maryland</i> , 366 U. S. 420 (1961)	27, 28, 29
<i>Pierce v. Society of Sisters</i> , 268 U. S. 510 (1925)	35
<i>Tilton v. Richardson</i> , 403 U. S. 672 (1971)	25, 30, 31, 33, 34

CONSTITUTIONS.

United States Constitution, Amendment One ..	2, 3, 5, 14, 21, 22, 23, 24, 26, 38
Amendment Fourteen	3
New York Constitution, Article XI, § 3	5, 16

STATUTES AND REGULATIONS.

58 Stat. 765, 40 U. S. C. §§ 484(j), 484(k)	25
60 Stat. 1040, 42 U. S. C. §§ 29-92	25
60 Stat. 230, 42 U. S. C. § 1751	25
63 Stat. 1051, 7 U. S. C. § 1431	25
66 Stat. 663, 38 U. S. C. § 911	25
72 Stat. 1580, 20 U. S. C. §§ 401-589	25
77 Stat. 363, 20 U. S. C. §§ 701-757	25
79 Stat. 27, 20 U. S. C. §§ 236-244, 331-332	25
79 Stat. 1219, 20 U. S. C. §§ 1001-1144	25

III.

	PAGE
12 U. S. C. §§ 1749-1749(e)	25
28 U. S. C. §§ 1253, 2101(b)	3
28 U. S. C. §§ 2281, 2284	2
New York Laws, 1970, ch. 138 ...	2, 3, 10, 15, 18, 20, 27, 29, 30, 32, 36, 38, 39, A1
New York Education Law, Article 17	8
New York Education Law, § 216	15
New York Education Law, § 305	8, 15
New York Education Law, §§ 801-811	15
New York Education Law, § 3002	15
New York Education Law, § 3204	8, 15
New York Education Law, § 3210	8
New York Education Law, § 3205	15
New York Education Law, § 4601	15
New York Real Property Tax Law, § 420	15
8 New York Code Rules and Regulations, § 176.1(b) ..	9, 15

MISCELLANEOUS.

1 Annals of Congress (Benton ed., 1858)	24
107 Congressional Record 17351	25
Madison, <i>Detached Memoranda</i>	23, 24
The Writings of Thomas Jefferson (Memorial Edition, 1904), Vol. 19	23

LETTER OF THE PRESIDENT

TO THE SENATE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

ON THE 14TH OF MARCH, 1890

RELATIVE TO THE PROPOSED

AMENDMENT TO THE CONSTITUTION

RELATIVE TO THE

RIGHT OF THE STATES

TO REGULATE COMMERCE

WITH FOREIGN COUNTRIES

AND WITH EACH OTHER

AND TO REGULATE

COMMERCE WITH THE

INDIAN TRIBES

AND TO REGULATE

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IN THE
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October Term, 1972

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EWALD B. NYQUIST, as Commissioner of Education of the
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Rochester, New York, **BISHOP LOUGHLIN MEMORIAL HIGH**
SCHOOL, Brooklyn, New York, **BAIS YAAKOV ACADEMY FOR**
GIRLS, Richmond Hill, New York, and **YESHIVAH RAMBAM**, Brooklyn,
New York,

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and

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against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, **ALGERNON D. BLACK**, **THEODORE BROOKS**,
HERSCHEL CHANIN, **NAOMI COWAN**, **REBECCA GOLDBLUM**,
BENJAMIN HAIBLUM, **BLANCHE LEWIS**, **EDWARD D. MOLD-**
OVER, **ARYEH NEIER**, **DAVID SEELEY**, **ALBERT SHANKER** and
HOWARD SQUADRON,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS LEVITT AND NYQUIST

Citations to Opinion Below

The opinions of the United States District Court for the
Southern District of New York are reported at 342 F. Supp.
439 (printed in Appendix to Jurisdictional Statement of
Appellants).

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, Sections 2281 and 2284. The judgment holds Chapter 138 of the New York Laws of 1970 to be unconstitutional on the ground that it violates the Establishment Clause of the First Amendment to the Constitution of the United States, and enjoins the defendants Levitt and Nyquist from making payment under that Chapter to nonpublic schools in the State.

The complaint sought declaratory and injunctive relief against the implementation of Chapter 138, alleging that the statute violated the Establishment Clause by providing payments to nonpublic schools in the State as partial reimbursement to those schools of the cost of providing testing and record keeping services to the State, as required by State Law and regulation.

The final judgment granting the relief sought in the complaint was made and entered June 1, 1972. Notice of appeal on behalf of defendants Levitt and Nyquist was filed on June 19, 1972 in the United States District Court for the Southern District of New York. Notices of Appeal were also filed on behalf of the intervenor-defendants Cathedral Academy, St. Ambrose School, and Bishop Loughlin Memorial High School on June 30, 1972, on behalf of intervenor-defendant Earl W. Brydges on July 1, 1972, and on behalf of Bais Yaakov Academy for Girls and Yeshivah Rambam on July 10, 1972.

The appeals were docketed August 18, 1972. Probable jurisdiction was noted on November 6, 1972.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United State Code, Sections 1253 and 2101(b).

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

"Congress shall make no law respecting the establishment of religion * * *."

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States.

Chapter 138 of the New York Laws of 1970 provides as follows in pertinent part (the full text is set out as an Appendix to this brief):

"Section 1. It is hereby determined and declared as a matter of legislative finding:

"That the state has a primary responsibility to assure that its precious resources, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

"That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

"That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

"Non public schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

"§ 2. There shall be apportioned annually by the commissioner [of education] to each qualifying school, for school years beginning on or after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulations. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

"a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

"b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

* * *

"§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

"9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law [which prohibits discrimination in pupil enrollments]."

Question Presented for Review

Does the partial reimbursement by the State of nonpublic schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in accordance with the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

Statement of the Case

Appellees, suing on behalf of themselves and their children, commenced this action seeking to have Chapter 138 of the New York Laws of 1970 declared unconstitutional, alleging that it violates the Establishment Clause of the First Amendment to the Constitution of the United States. Appellees also alleged that the statute violate Article XI, section 3, of the New York State Constitution, which prohibits the expenditure of public moneys, except for examination or inspection, to or in aid of denominational schools or in which religious doctrines are taught. The complaint sought an injunction restraining the implementation of the law, insofar as it provides money for sectarian schools.

A motion was made by the defendants in the action, seeking dismissal of the complaint on several grounds, among which were that the complaint failed to state a claim upon which relief could be granted, and dismissal of the complaint as to one of the original defendants, Nelson A. Rockefeller, on the ground that the complaint sought no

relief against that defendant and that he had no power or responsibility in the administration of the law. The latter part of the motion was granted by the District Court (LASKER, J.). Defendants also sought dismissal of the action on the ground that the complaint raised a threshold question of validity of the statute under the Constitution of the State of New York and that that question should be determined in State Courts prior to the commencement of a Federal Court proceeding. That application was denied (*Committee for Public Education and Religious Liberty v. Rockefeller*, 322 F. Supp. 678).

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Subsequent to the granting of an order for the convening of a three-judge District Court, interrogatories were served by intervenor-defendants on the plaintiffs and by the plaintiffs upon defendants and intervenor-defendants. The answers to those interrogatories are a part of the record in this case and the Exhibits to the answers of defendant Nyquist to plaintiffs' interrogatories have been submitted to the Court as a supplement to the Appendix on this appeal.

The facts are not in dispute. On April 18, 1970 Governor Rockefeller signed Chapter 138 of the Laws of 1970, to become effective July 1, 1970. The statute directs the Commissioner of Education of the State of New York to annually apportion to nonpublic schools in the State the sum of \$27.00 multiplied by the average daily attendance of pupils in grades one through six in each such school, and the sum of \$45.00 multiplied by the average daily attendance of pupils in grades seven through twelve in each nonpublic school. That sum would be reduced by

1/180th for each day less than 180 that the school was actually in session during a school year.

The moneys provided for in the statute are to be paid to the nonpublic schools as compensation for expenses incurred in rendering services to the State for examination and inspection, in connection with administration, grading and compiling and reporting of the results of tests, maintenance of records of pupil enrollment and attendance and reporting thereon, recording of personnel qualifications and characteristics, and the preparation and submission to the State of various other reports provided for by law or regulation.

The sum of \$28,000,000 has been appropriated for payments to be made in each fiscal year since the enactment of the statute. Since plaintiffs did not seek a temporary restraining order enjoining payment of the appropriated amounts until the time of argument on the merits in the District Court, payments were made under the act by the State to the nonpublic schools for the entire 1970-1971 school year and for the first half of the 1971-1972 school year.

The expressed purpose of the statute, as set forth in the first section of the act, is to insure, through examination and inspection, that the young people of the State enrolled in nonpublic schools are in daily attendance upon instruction as required by law and are maintaining levels of achievement which will adequately prepare them for "the challenges of American life in the last decades of the twentieth century".

The expressed purpose of the statute is to provide compensation to the nonpublic schools for services mandated by State law or by regulation of the Commissioner of Education. These services are performed for the purpose of

determining that the schools meet the requirements of the compulsory attendance laws of the State and the requirements of minimal educational instruction and standards. This involves both testing and record keeping requirements from which the State may in the course of visitation or inspection of the schools or from reports compiled from the records so kept determine whether or not the requirements of State law are being met.

New York State has set minimum standards of educational quality through the requirements of various sections of the New York Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to those of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected.

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regents' examinations, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils. In the Court below, counsel for ap-

pellees argued that most of the tests administered in the nonpublic schools were formulated by teachers, were not provided for or required by regulation, and were an integral part of teaching, thus rendering payment for the costs of administering and reporting on the results of such tests payment in support of the teaching mission of the nonpublic schools. The overwhelming majority of tests given in public or nonpublic schools are formulated, administered and graded by teachers. The importance of these tests in determining the equivalency of education provided by the nonpublic schools is, however, recognized by regulation. Section 176.1(b) of the Regulations of the Commissioner of Education (8 NYCRR 176.1[b]) specifically provides as to nonpublic schools:

"Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner."

In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of assuring that the minimum State educational standards are maintained throughout all the schools in the State, both public and non-public alike.

As of April, 1970, there were 2,038 nonpublic schools in the State of New York. A staff study prepared for the State Education Department listed some of the required services performed by those schools, among which were PEP testing, administering Regents examinations for schools offering a Regents diploma, plus equivalent examinations for areas where Regents examinations are not offered, periodic examinations for the evaluation of the

educational progress of students, providing transfer records certifying grades, providing health transfer records, providing information under the Basis Educational Data System, which includes statistical information as to students, teachers, curricula offered, physical plant, etc., statistical data pertaining only to nonpublic secondary schools, somewhat more detailed in nature and type of information than the Basic Educational Data System, maintaining health service records, administering examinations to students not qualifying for a Regents diploma and maintaining those records for inspection, and maintaining attendance records. The same report recommended expansion of the information required to be provided by the nonpublic schools but concluded that "The present funding for the performance of such services is not adequate to cover this area" (Supplement to Appendix, Exhibit F).

Subsequent to the enactment of Chapter 138, another study was prepared for the State Education Department by three research consultants, each operating independently, analyzing the cost of the mandated services for which compensation is made pursuant to Chapter 138. That study concluded that the \$28,000,000 specified in the law as compensation for the mandated services is justified on the basis of the actual cost to the schools in performing those services. This report is attached to defendant Nyquist's answer to plaintiffs' interrogatories as Exhibit D (Supplement to Appendix Exhibit D). In all cases, the amount expended either in the school as a whole or on a per pupil basis was found to be substantially greater than the amount of compensation received from the State for those services. For example, it was found that the average per pupil cost for mandated services is \$82.50 per year, as contrasted with the Chapter 138 formula of \$27.00 per pupil

at the elementary level and \$45.00 per pupil at the secondary level.

In October 1971, a study of the costs of administration of only three required tests was made and submitted to the Regents of the University of the State of New York (Supplement to Appendix, Exhibit G). That study showed that those three tests alone cost the nonpublic schools an average of \$19.00 per pupil. It also concluded that the per pupil allocation of Chapter 138 was justified on the basis of the actual costs of the services provided.

The District Court, in its decision in this case, found the New York statute to be unconstitutional under Federal constitutional provisions and did not rule on contentions made by the plaintiffs as to constitutionality under provisions of the State Constitution. The Court based its finding of unconstitutionality upon the recent decisions of this Court in *Lemon v. Kurtzman* and *Earley v. DiCenso* (403 U. S. 602). The Court found that the nature of the aid provided under the New York statute is the same as that provided under the Pennsylvania act in *Lemon*, that is, "financial assistance paid directly to the church-related school." The Court found inapplicable any analogy to bus transportation, school lunches or textbooks as "secular, neutral, or non-ideological" services, on the basis that the greatest proportion of the funds are payable as reimbursement for the administration of tests and that testing "is an integral part of the teaching process." An actual or potentially excessive entanglement between government and religion was also found by the Court, as was a potential for "aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation."

The dissenting District Judge (PALMIERI, J.) would have found the statute to be a "legitimate exercise of the duty of

the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law." Judge PALMIERI's opinion pointed to the fact that the statute provides for only a fractional reimbursement of the cost of record keeping and testing required of nonpublic schools by State law and regulation. The dissenting opinion further observed:

"A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U. S. 672, 678 (1971), that

'candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication'

and that '[j]udicial caveats against entanglement' are a 'blurred, indistinct and variable barrier.' "

The dissenting judge would have found that reimbursement for testing and record keeping constituted payment for a neutral, secular and nonideological purpose, and was, thus, constitutional.

Subsequent to the entry of judgment a motion was made on behalf of the Majority Leader of the New York State Senate, Earl W. Brydges, for leave to intervene as a defendant. That motion was granted. Motions for a stay of the injunction pending appeal to this Court were also made, both in the Court below and to a Justice of this Court, and were denied.

Summary of Argument

No one will question that a State may not use tax money for the support of religion. That, however, is not at issue in this case. What is at issue here is a statute which provides for partial reimbursement to nonpublic schools of the costs of informational services provided by those schools to the State as a result of the mandates of statutes or regulations. New York State must permit children to attend nonpublic schools if they so desire; that is their constitutional right. At the same time, however, New York State has a legitimate area of concern in ascertaining that those children do attend school, as required by the compulsory Education Law of the State of New York, and that the schools they attend provide an education which meets State minimum standards. To obtain this information, New York State requires all schools, both public and nonpublic, to maintain records of attendance, health records, and personnel records of faculty, to administer certain specific State tests; and to maintain a continuous program of testing to provide information as to educational levels achieved; and to report to the State on the information contained in these records and ascertained from the tests. Public schools are partially reimbursed for these services in the form of State aid. The statute here at issue provides partial reimbursement to the nonpublic schools in the form of a fixed dollar amount per pupil (\$27.00 per elementary pupil and \$45.00 per secondary pupil). The moneys so provided are not provided to pay for the costs of educating children, but only to pay for the costs of informational services designed to determine whether, in fact, the children are being educated.

What is prohibited by the Establishment Clause is aid directed to the advancement of religion. Programs having the purpose of securing information necessary to determine

if State laws, regarding attendance at schools and minimal educational standards, are being met are not directed to the aid of religion; they do not have as their objective the aid of any or all religions, but only assist the State in securing necessary information, and assist children in assuring that the schools they attend provide adequate educational programs. This program does not, therefore, constitute an establishment of religion.

The compensation of schools for provision of informational services to the State has a secular primary effect and purpose. It does not, therefore, constitute an establishment of religion in violation of the prohibitions of the First Amendment.

Where the purpose and effect of the statute is solely to provide reimbursement for noneducational services provided to the State and not to assist the nonpublic schools in their educational functions, there is neither room for nor possibility of excessive entanglements between the church and State. With or without compensation, the State may require and the schools must provide information as to compliance with the compulsory attendance laws and with the requirements of minimal educational standards. The mere fact that the State sees fit to compensate the schools for a portion of the cost of providing the information required by the State does not render either the program or the reimbursement unconstitutional, either in the historic concept of the First Amendment or as it has been interpreted by this Court.

ARGUMENT

The compensation of nonpublic schools for secular non-teaching services rendered to the State in compliance with State law and regulation does not constitute an establishment of or aid to religion.

- A. Factually, the New York Legislature's intent in enacting Chapter 138 was to compensate schools for providing required information to the State, concerning compliance with the State's Education Law by nonpublic schools.

The expressed purpose of Chapter 138 of the New York Laws of 1970 is to partially compensate nonpublic schools, without regard to whether they are sectarian or nonsectarian in nature, for expenses incurred by those schools in keeping records, administering tests, and filing reports as required by State law and regulation.

New York's legislative history clearly shows the incorporation of nonpublic schools within the State's ambit of educational concern. For example, in the State of New York nonpublic schools are chartered by the Board of Regents of the University of the State of New York (New York Education Law, § 216 [McKinney's Consolidated Laws of New York, Book 16]). There is regular inspection by the State Education Department of the nonpublic as well as the public schools (Education Law, § 305 [2]). Nonpublic schools are exempt from taxation (New York Real Property Tax Law, § 420 [McKinney's Consolidated Laws of New York, Book 49 A]). Attendance at a nonpublic school complies with the State's compulsory education law (Education Law, § 3204) and satisfies the requirements for part-time attendance (Education Law, § 4601). Terms of attendance in the nonpublic as well as the public school are prescribed (Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (Education Law, §§ 3204, 801-811, 3002).

The State has not only imposed these requirements on the nonpublic schools but it has also recognized the importance of insuring that these requirements are complied with by both sectarian and nonsectarian nonpublic schools. In furtherance of that interest an exception was incorporated into the New York State Constitution's prohibition against the use of public moneys in aid of denominational schools, authorizing the use of public moneys "for examination or inspection" of those schools (New York Constitution, Article XI, § 3).

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regents' examinations, (state-wide tests of subject matter achievement), the so-called "PEP Tests" (Pupil Evaluation Program) in grades 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils. In the District Court, counsel for appellees argued that most of the tests administered in nonpublic schools were devised by the teachers and were an integral part of the teaching program of nonpublic sectarian schools, thus contending that payment for the costs of administering and reporting on the results of such tests payment in support of the teaching mission of the schools rather than compensation for nonideological services to the State. The overwhelming majority of tests given in public and nonpublic schools alike are formulated, administered and graded by teachers. However, the importance of such teacher-formulated tests in determining the equivalency of education provided by the nonpublic schools has been recognized by regulation. Section 176.1 (b) of the Regulations of the Commissioner of Education (8 NYCRR 176.1 [b]) specifically provides as to nonpublic schools:

"Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner."

In addition, to testing programs, various reports are required from nonpublic as well as public schools, all of which are designed to assure that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike.

As of April, 1970, when Chapter 138 was enacted, there were 2,038 nonpublic schools in the State of New York. A staff study prepared at that time for the State Education Department listed some of the required services performed by those schools, among which were administration of the tests described above, providing transfer records certifying grades, providing health transfer records, providing information under the Basic Educational Data System, which includes statistical information as to students, teachers, curricula offered, physical plant, etc., statistical data pertaining only to nonpublic secondary schools, somewhat more detailed in nature and type of information than the Basic Educational Data System, maintaining health services records, administering examinations to students not qualifying for a Regents diploma and maintaining those records for inspection, and maintaining attendance records. That same report recommended expansion of the information required to be provided by the nonpublic schools, but concluded that "[t]he present funding for the performance of such services is not adequate to cover this area" (Supplement to Appendix, Exhibit F).

These requirements, imposed upon the nonpublic schools by law or regulation, involve considerable additional expense to the schools for which, immediately prior to the enactment of Chapter 138, the nonpublic schools were not compensated, although public schools do receive compensation in the form of state aid, based on a percentage of their operating costs, for similar services which they render to the State.

Consequently, the program provided by Chapter 138 is merely a method of partially compensating all nonpublic schools for expenses entailed in keeping records and marking reports mandated by the State as part of its system of inspecting and examining the educational quality of nonpublic schools attended by children in compliance with the State's compulsory attendance law.

Nor is this a new program. While immediately prior to the enactment of Chapter 138 in 1970, nonpublic schools were not compensated for the expenses of examination and inspection required by the State, until 1968 some 250 nonpublic schools were so compensated and had since 1892. Beginning with Chapter 26 of the New York Laws of 1892, appropriations were made annually to "academies" for unspecified services in connection with compulsory attendance requirements. Those academies included sectarian and nonsectarian nonpublic schools. That provision was incorporated in the New York Education Law in the consolidation of 1907 as section 453 and was continued and renumbered as section 493 in the consolidation of 1910. The provision thereafter remained unchanged until its repeal in 1930. However, even after the repeal of section 493, the State's Local Assistance Appropriation Bills (the appropriation for state aid) contained, until 1968, an appropriation of \$35,000 in connection with the "attendance requirements of academic pupils at academies meeting the requirements of

regents rule". These moneys were apportioned and paid as they had been prior to 1930 to sectarian and nonsectarian schools alike.

While the program and appropriations had been continued, the total amount of money so provided had remained unchanged since 1931. Thus, the per-pupil allocation had diminished in proportion to the increasing enrollment in nonpublic schools. Consequently, by 1968, the per-pupil allocation, spread over 130,000 academic pupils, in nonpublic schools which were eligible for that assistance, amounted to less than 27 cents per pupil. Pupil enrollment increases and economic inflation had reduced the amount paid to only a small fraction of the cost of keeping the records necessary to qualify for receipt of the money. Additionally, the increased proportion of public school support which was being received from the State, as contrasted with state aid in 1931, increased the disparity between public and nonpublic schools in compensation received for this one class of record keeping services alone. Furthermore, the program originally involved only certain specified academies and no contribution was made toward the expenses incurred by other nonpublic schools in which were enrolled the majority of the 850,000 pupils in nonpublic schools throughout the State, and which performed the same services for the State.

The program adopted by the New York Legislature in 1970, therefore, merely reinstated a past practice of compensating nonpublic schools for record keeping and examination services required of them by the State, updated the amount paid to reflect current conditions, and made the base of payment more equitable by including all nonpublic schools and all examination and record keeping requirements of the State. The cost analysis studies made by the

Education Department (Supplement to Appendix, Exhibits D and G) demonstrate that the payments made to the non-public schools are justified in amount and, in fact, are still substantially less than the actual cost of performing the services.

Chapter 138 of the New York Laws of 1970 clearly sets forth the purposes for which the payments thereunder are to be made. In the legislative findings, section 1 of the statute, is stated:

“* * * the state has a primary responsibility to assure that its precious resource the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

“* * * the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.”

After setting forth the general purpose of the statute, the act then sets forth the specific items for which payments are to be made. These are the “expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.”

Thus, it is clear that the payments provided for in the statute are for the purpose of examination and inspection

of nonpublic schools to assure that the children attending them are complying with the State's compulsory attendance law and that the schools meet minimal standards of educational quality. The payments are not made for the purpose of aiding the educational or teaching mission of the schools.

- B. The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion in the historical context of the First Amendment.**

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying the Amendment to current situations (see, e.g., *Everson v. Board of Education*, 330 U. S. 1 [1947]; *Abington School District v. Schempp*, 374 U. S. 203 [1963]; concurring opinions of Justices DOUGLAS and BRENNAN in *Lemon v. Kurtzman*, 403 U. S. 602 [1971]).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove many colonists from Europe to America. But those same practices were, in many instances, transplanted to the New World and, at the time of the adoption of the Constitution and the Bill of Rights, there were established churches in a majority of the original Thirteen Colonies and almost every state exacted some kind

of tax for church support. In the language of the opinion of this Court in the *Everson* case, *supra* (p. 11):

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment? While not a member of the Congress which adopted the Bill of Rights, Thomas Jefferson is considered as a spokesman for the anti-establishment movement. It was he who first used the phrase "a wall of separation between church and state" in his letter to the Danbury Baptists in reply to their address of congratulation and good wishes upon his becoming President of the United States. That Jefferson did not consider this "wall" to bar all relations between government and religion is clear from both his actions and subsequent writings. Thomas Jefferson was President of the United States for eight years, during which time Federal funds were used to aid religion in various ways without protest from the President. Federal funds were used to support missionaries to Christianize and civilize the Indians. The chaplain services for the Army and Navy had been established long before Jefferson became President and was continued under his tenure as Commander-in-Chief. Probably Jefferson's most specific statement in regard to the relation of government to religion is found in a statement made in 1822, after he had left

the presidency, concerning freedom of religion at the University of Virginia, of which he was one of the founders. In his report as Rector, Mr. Jefferson stated:¹

"The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit of the public provision made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools, on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected . . . or in the lecturing room of such professor."

Jefferson, therefore, saw no breach in the "wall of separation" resulting from nonpreferential aid to sectarian students, or from accommodation of secular and sectarian institutions to each other.

Next to Jefferson, Madison ranks as probably the most significant spokesman on the meaning of the First Amendment. Possibly he should even be given foremost status since he was primarily responsible for the language of the Amendment. On June 8, 1789, Madison in the First Congress stated that his understanding of the meaning of the

¹ 19 The Writings of Thomas Jefferson (Memorial Edition, 1904), 414 *et seq.*, quoted in *McCullum v. Board of Education*, 333 U. S. 203, 245-246 (1948).

Amendment was that: "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."² In his *Detached Memoranda*, written some time after 1817, Madison wrote that the people of the United States, "have the noble merit of first unshackling the conscience from persecuting laws and of establishing among religious sects a legal equality."

Madison also was President of the United States for eight years, during which time also Federal funds supported military chaplaincies and missionaries to the Indians without criticism from the President.

We can find no support in the writings and opinions of the formulators and spokesmen for the First Amendment for the argument that all public payments to all nonpublic schools, regardless of their religious affiliation, constitutes an establishment of religion. Nor can any support be found for that proposition in the total record of the Presidents or the Congress.

As previously stated, Federal funds for missionaries to the Indians were first paid under Washington and continued until 1900 when changed conditions on the reservations, not constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt

² 1 Annals of Congress 729-731 (Benton ed. 1858).

from the draft, as are conscientious objectors; the Bible is used for administering oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; Federal funds were made available to sectarian institutions to repair buildings and replace equipment lost or damages in the floods of June, 1972; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.³

Many other Federal statutes have provided nondiscriminatory aid to students attending both public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act,⁴ free milk under the Agriculture Act of 1949,⁵ the National Defense Education Act of 1958,⁶ College Housing Act of 1950,⁷ the Higher Education Facilities Act,⁸ the Higher Education Act,⁹ the Elementary and Secondary Education Act,¹⁰ the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,¹¹ and the G. I. Bill of Rights.¹²

³ Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92.

⁴ 60 Stat. 230 (1946), 42 U. S. C. § 1751.

⁵ 63 Stat. 1051 (1949), 7 U. S. C. § 1431.

⁶ 72 Stat. 1580 (1958), 20 U. S. C. §§ 401-589.

⁷ 12 U. S. C. §§ 1749-1749e.

⁸ 77 Stat. 363 (1963), 20 U. S. C. §§ 701-757, *Tilton v. Richardson*, 403 U. S. 672 (1971).

⁹ 79 Stat. 1219 (1965), 20 U. S. C. §§ 1001-1144.

¹⁰ 79 Stat. 27 (1965), 20 U. S. C. §§ 236-244, 331-332.

¹¹ 58 Stat. 765 (1944), 40 U. S. C. §§ 484 (j) and 484 (k); 107 Cong. Rec. 17351.

¹² 66 Stat. 663 (1952), 38 U. S. C. § 911.

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment does not bar non-preferential payments of public money to all schools, all pupils, or all institutions, regardless of religious affiliation, and that where valid secular purposes are the primary basis for the payment of public money, such payments are constitutional and valid.

- C. The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion as defined by the decisions of this Court, but is rather a constitutional use of State funds for State purposes.**

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case (*Everson v. Board of Education*, 330 U. S. 1 [1947]). In that case, this Court held that the nonpreferential provision of school bus transportation for children attending both public and nonpublic schools did not constitute aid to or an establishment of religion. In so holding, the Court, in an opinion by Mr. Justice BLACK, clearly set forth the purpose and intent of the Establishment Clause, stating (pp. 15-16):

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can

be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That opinion did not declare to be prohibited general public programs not intended or directed to the aid or religion which incidentally or collaterally aid a religious institution.¹³

Even more recently than *Everson*, a decision of this Court has clearly held that laws are not rendered invalid solely because there may be some indirect or collateral aid to proponents of a religious belief or to sectarian institutions. In the Sunday-closing cases, this Court upheld the validity of laws making Sunday a universal day of rest in the face of the admittedly religious origin of those laws and the fact that their current enforcement incidentally aids certain religious denominations in the profession of their beliefs. In so holding, this Court interpreted the Establishment Clause "in the light of its history and the evils it was designed forever to suppress" (*McGowan v. Maryland*, 366 U. S. 420, 442 [1961]). The opinion further states (p. 442):

"* * * the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

¹³ The only aid to religion or religious institutions which might be found in the payments pursuant to Chapter 138 would arise out of the freeing of the institution's funds, which would otherwise be used in the performing of State mandated functions, for the sectarian use of the institution.

Furthermore, as this Court said in *Everson*, (*supra*, 330 U. S., p. 18):

"That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In the instant case, where the State has imposed these record keeping, examination and reporting requirements upon the nonpublic schools for State purposes, to deny the State the right to compensate the schools, at least in part, for the cost of fulfilling those requirements would be, in effect, requiring the State to be the adversary of religious institutions.

Mr. Justice FRANKFURTER, concurring in *McGowan*, *supra*, stated the purpose of the Establishment Clause to be simply to assure that religion, as religion, would not be made the object of legislation (366 U. S., p. 465). In this regard, he stated, the object of the legislation must be determined (pp. 466-467):

"To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McColum*. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for the promotion of religion—the statute

cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce v. Society of Sisters*, 268 U. S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."

In the same opinion, rejecting a plea to look behind the legislative findings of the statutes there involved, Mr. Justice FRANKFURTER also observed (p. 469):

"... the private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' *McCray v. United States*, 195 U. S. 27, 56. 'Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts.'"

Applying these decisions to the instant case, we observe the following factors. The intent of the statute was set forth in the statement of legislative policy in Chapter 138, as has been quoted previously in this brief. That state-

ment may be summarized to show intent to assure that students who elect to attend nonpublic schools are actually in daily attendance at those schools; that they receive an education which at least minimum requirements, both in course content and teacher qualifications; and that the education they receive is adequate for them to reach levels of achievement at least on a level with students in public schools. The statute demonstrates a secular policy of assuring equality of educational opportunity to all children.

Of greatest significance in determining the validity of the statute here involved are the decisions of this Court in *Lemon v. Kurtzman* (403 U. S. 602 [1971]) and *Tilton v. Richardson* (403 U. S. 672 [1971]) as the latest examination by this Court of that issue. An analysis of those opinions, we submit, clearly shows that the program enacted by Chapter 138 is not prohibited under the decisions of this Court and is, in fact, a valid, constitutional program of the State.

In the *Lemon* case, the Court was confronted with two statutes, one of which provided a subsidy for the payment of the salaries of teachers in nonpublic schools and the other provided compensation to the schools for the teaching of certain secular subjects by the nonpublic schools. In *Tilton*, the Federal Higher Education Facilities Act, providing for the construction of college academic buildings, was involved.

Examining the statutes in those cases, this Court observed in *Lemon* (403 U. S., p. 612):

"Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation [between constitutionality and unconstitutionality] in this extraordinarily sensitive area of constitutional law."

and again (p. 614):

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

In *Tilton*, the Court repeated the statement in *Lemon*, first above quoted, as applicable to that case as well (403 U. S., p. 678).

The tests of constitutionality were stated in *Lemon* as being (pp. 612-613):

"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

* * *

"* * * Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz*, *supra*, at 674."

In *Tilton*, this Court said (p. 679):

"The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In applying those tests, this Court stated in *Lemon* (p. 615):

"In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions

benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

In the instant case, while the character and purposes of the institutions receiving the money may be the same as those in *Lemon*, the nature of the payments so provided and the resultant relationship between government and religion are vastly different.

This Court in the cases above cited recognized that the State has certain legitimate concerns which establish a legitimate area of contact with sectarian schools, and that certain types of aid or payments are by their nature constitutional, even though they may provide some indirect benefit to the sectarian mission of the schools. In that regard, this Court said in *Lemon* (403 U. S., p. 613):

"A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."

and again at page 614:

"Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts."

In that regard, it should be noted, Chapter 138 is directed, in part at least, to assuring compliance with the compulsory attendance laws of the State of New York.

Further, in *Lemon*, this Court also observed (pp. 616-617):

"Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

In *Tilton*, this Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679):

"The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and non-ideological. It compensates all nonpublic schools, sectarian and non-sectarian alike, for record keeping, testing and reporting, required by the State in enforcing the compulsory school attendance laws and for the purpose of assuring that the schools are fulfilling requirements of State law and regulation providing for minimal educational standards. The tests for which compensation is made are either State devised tests, administered in both public and nonpublic schools pursuant to State requirements, or are tests designed by teachers but administered as required by regulation of the Commissioner of Education in order to measure compliance with the minimal educational standard requirements. These testing, record keeping and reporting functions are both secular and non-ideological in nature.

Although compensation of the schools for these non-ideological services will free other money of the schools so that it could be used to advance the sectarian mission of the schools, or for the improvement of secular educational services, that factor alone is not a basis for invalidation of the statute, as this Court observed in *Tilton*, as quoted above.

While invalidating the statutes at issue in the *Lemon* case, this Court also found that a "comprehensive, discriminating, and continued state surveillance will be inevitably required" to insure that restrictions against the use of the money, there provided, for sectarian purposes would be obeyed. This Court was concerned about the extent of the inspection and auditing which would be required to determine the amount of a school's expenditures for secular and sectarian education for the purpose of determining the amount of compensation to be paid. This, the Court found, would result in "excessive entanglement" between government and religion. Here, however, there is no need for continuing surveillance. In the instant case, the statute provides for a flat grant, worth much less than the actual cost to the schools of the services rendered to the State, which is distributed to the schools as reimbursement for services already rendered and does not require continued auditing or surveillance to determine how the money is spent.

In *Tilton*, upholding the Federal Act there involved, this Court observed that "The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides." The Pennsylvania and Rhode Island statutes involved in *Lemon* were distinguished on the basis that "There are no continuing financial relationships or dependencies, no annual audits, and

no government analysis of an institution's expenditures on secular as distinguished from religious activities."

The statute in the instant case is immeasurably different from those invalidated in *Lemon*. The aid is secular, nonideological and neutral in nature. It does not involve annual audits or governmental surveillance over expenditures. It merely compensates the schools for a part of the costs they incur in providing record keeping and testing services required by the State in enforcing compulsory school attendance laws and laws requiring attainment of minimal educational standards by the nonpublic schools.

The education of our Nation's children has, quite properly, been recognized by this Court as a proper subject of state legislation enacted in furtherance of a public interest (*Cochran v. Louisiana State Board of Education*, 281 U. S. 370 [1930]; *Board of Education v. Allen*, 392 U. S. 236 [1968]). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning. Rather, educational goals may effectively be satisfied through private education (*Pierce v. Society of Sisters*, 268 U. S. 510 [1925]). As a corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory attendance laws through private educational institutions, this Court, in the *Allen* case, observed (392 U. S., p. 247):

"... if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function."

The statute here in question does not involve the State in the actual educational process of the schools. It does not compensate them for their teaching function as such. It does no more than compensate all private schools, sectarian

and nonsectarian alike, for the expenses of record keeping and administration of examinations necessary to assure that those schools are maintaining that quality of secular education necessary for the young people of the State, that is, in determining the "manner in which those schools perform their secular function."

In *Allen*, this Court further observed as to the nature of nonpublic schools (p. 245):

"The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education."

The State requirements, for which compensation is provided by Chapter 138, are directed solely to the secular educational function of the nonpublic schools and are compensation for measuring rather than teaching devices.

As to the powers of the States in regulation of nonpublic schools this Court stated in *Allen* (pp. 245-246):

"Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."

If the State may establish such regulations, and consequently require compliance with record keeping, reporting and testing requirements, in order to assure compliance with these regulations, then surely the State should be allowed to alleviate in part the cost burden it has imposed on the schools by these informational requirements.

It is necessarily a secular purpose and intent to assure that children attending nonpublic schools comply with the compulsory attendance laws of the State, that they are receiving an adequate education from qualified teachers, and that they are tested in accordance with State standards of academic achievement. Since these are secular, neutral and non-ideological requirements and services, fulfilling State-imposed requirements, and since the moneys apportioned to the nonpublic schools are solely for the purpose of compensating them for those required secular services, then neither the purpose nor the primary effect of the enactment is the advancement or inhibition of religion.

One final quotation from the *Allen* case is pertinent here, summarizing the relationship of the sectarian function to the secular education function of the private schools as viewed by this Court. The Court there stated (392 U. S., 247-248):

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial system, strongly suggest that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

If the State may expend public moneys to insure that public schools provide minimal levels of education, if the nonpublic schools are a constitutionally acceptable conduit for the teaching of children in secular subjects, if the State may require that nonpublic schools meet specific standards of minimal educational offerings and achievement, and if the State may require that nonpublic schools keep records, administer tests and report thereon in order to assure that they comply with State imposed educational requirements, then the State must also be able to spend public moneys to assure that these schools actually do perform in an acceptable manner and that that students attend in compliance with the compulsory education laws. That permissible expenditure of public moneys must include the right to compensate the schools for the expenses imposed upon them by the examination and inspection requirements of the State.

Chapter 138 of the New York Laws of 1970 has a secular legislative intent and a primary effect which neither advances nor inhibits religion. The payments provided under Chapter 138 are for neutral, secular and non-ideological services to the State by the nonpublic schools. The provision for those payments does not involve an excessive entanglement between government and religion. The statute, therefore, does not violate the Establishment Clause of the First Amendment to the Constitution of the United States and is, consequently, constitutional.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and that judgment should be entered holding Chapter 138 of the New York Laws of 1970 to be constitutional and valid.

Dated: December 18, 1972.

Respectfully submitted,

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of Counsel

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APPENDIX

Chapter 138

An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor.

Approved April 18, 1970, effective July 1, 1970.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Non public schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools

Chapter 138 of New York Laws of 1970

which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not

Chapter 138 of New York Laws of 1970

in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.
2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

Chapter 138 of New York Laws of 1970

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a non-profit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid on or before March fifteenth of such year, and the second to consist of the balance and to be paid on or before May fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

Chapter 138 of New York Laws of 1970

§ 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect July first, nineteen hundred seventy.

Chapter 12 - The Law of the State

1. The law of the state is the body of rules and regulations which govern the conduct of the citizens of the state. It is the law which is binding on all the citizens of the state and which is enforced by the state.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New
York, and EWALD B. NYQUIST, as Commissioner of
Education of the State of New York,
Appellants,

VS.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY ET AL., *Appellees;*

EARL W. BRYDGES, as Majority Leader and President
pro tem of the New York State Senate, *Appellant,*

VS.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY ET AL., *Appellees;*

CATHEDRAL ACADEMY ET AL., *Appellants,*

VS.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY ET AL., *Appellees.*

On Appeal from the United States District Court for the
Southern District of New York

**BRIEF FOR APPELLANTS BAIS YAAKOV
ACADEMY FOR GIRLS AND YESHIVAH RAMBAM**

OPINION BELOW

The majority and dissenting opinions of the three-judge district court are reported at 342 F.Supp. 439.

JURISDICTION

The district court filed its final order and judgment permanently enjoining the implementation of chapter 138 of the New York Laws of 1970 on June 1, 1972 (App. 94a). Appellants Bais Yaakov Academy for Girls and Yeshivah Rambam filed a notice of appeal to this Court on July 10, 1972, and their Jurisdictional Statement on August 18, 1972. Probable jurisdiction was noted on November 6, 1972 (App. 120a-121a). The jurisdiction of this Court rests on 28 U.S.C. 1253.

STATUTE INVOLVED

The New York Mandated Services Act, chapter 138 of the New York Laws of 1970, appears in the Appendix to the brief for appellants Levitt and Nyquist at pages A1-A5.

QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment is violated by a state statute which provides reimbursement to nonpublic schools for the costs of record-keeping and other administrative services which are entirely collateral to the educative function, are made obligatory on the schools by state law, and are designed to fulfill the State's duty to examine and inspect such schools.

STATEMENT

This case concerns a law enacted in 1970 by the New York State Legislature for the purpose of reimbursing nonpublic schools "for expenses of services" for a variety of administrative tasks "provided for or required

by [state] law or regulation." The law—commonly known as the Mandated Services Act—authorized appropriations to cover the costs of "examination and inspection" in connection with the administration of certain student achievement tests, the "maintenance" of enrollment, attendance, and health records for students, the "recording" of personnel qualifications and the "preparation and submission" of required reports to State agencies. The constitutionality of the law was challenged by the appellees, and a three-judge district court (Hays, C. J., and Lasker and Palmieri, D. J.), by a 2-to-1 vote, determined that it violated the Establishment Clause of the First Amendment as applied in this Court's recent decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The majority of the three-judge court held that the only significant difference between the Pennsylvania statute held impermissible in *Lemon* and the present law was "that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing." 342 F.Supp. at 443. That distinction, said the majority below, is "insufficient to avoid the rule of *Lemon-Earley*." *Ibid*. The majority also relied on its predictions that administration of the law would "sooner or later" result in "the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement" (*id.* at 444) and that this form of state assistance "will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation" (*id.* at 445). The dissenting judge (Palmieri, J.), noted "that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the

schools expend for this purpose." He found "neither entanglement nor involvement between church and state" and would have dismissed the complaint (*id.* at 445-446).

ARGUMENT

I

REIMBURSEMENT FOR NONEDUCATIVE ADMINISTRATIVE SERVICES IMPOSED ON A SCHOOL TO FACILITATE STATE SUPERVISION OF EDUCATION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The statute being challenged in this case provides for payments to be made directly from the public treasury to nonpublic schools—including, to be sure, some which perform religious functions and impose on their students religious restrictions and requirements. The majority of the court below did not look beyond this superficial similarity to the statute invalidated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and struck down this law because it decided that this case, like *Lemon*, involves "financial assistance paid directly to the church-related school." 342 F.Supp. at 443.

In so doing, the majority below ignored the nature, purpose and effect of the State's payment. Unlike *Lemon*, this case concerns reimbursement for administrative services which are peripheral to the educative function of a school. The maintenance of accurate attendance rolls and health records is obviously not an essential part of the education of a school's students. Such records may be useful, in various ways, to a school's administrators, but they are mandatory *only* because they are indispensable to state officials who supervise a state's educational system and are responsible to enforce laws against truancy and regulations governing the health of children.

The same is obviously true of a standardized student evaluation and testing system. Schools can educate their children capably and efficiently without administering state-wide examinations or even giving locally-developed tests whose results are reported to state officials. The purpose of such a testing program is to assist the State in evaluating the performance of non-public schools, not directly to benefit the students or those who guide the schools.

Contrary to the views of the majority below, there is, therefore, a great difference between reimbursement "principally for teaching" and reimbursement "primarily for testing." Teaching is the very essence of education; it directly and immediately benefits the students in the school; and it lends itself—as the Court's opinion in *Lemon* observed—to the inculcation of religious doctrine. 403 U.S. at 617-619. Testing is peripheral to education; it benefits principally third parties—such as state officials—who wish to evaluate the school; and it is totally nonideological.

Moreover, the administrative services which are made reimbursable by the New York statute are the kind which a private school might well discard if they were not required by state law. Modern pedagogic theory has questioned the usefulness of examinations, and there are many institutions of higher learning which have, in recent years, eliminated testing. Since the administrators of the New York educational system wish, *for their own benefit*, to have some objective measure of performance in schools under their jurisdiction, they continue to require that tests be administered.

Such a requirement could, of course, be implemented by having state officials administer the tests themselves

at locations provided by the State at state expense. The same could be done for student attendance and health records. State officials could visit all private schools each day to compile attendance rolls and could gather health information directly from parents of students. The New York legislature has obviously decided that this is too cumbersome and expensive a route.

The question presented by this case, therefore, is whether it is unconstitutional for New York to recognize that the imposition of these administrative tasks on the schools—mandated principally to assist state officials—should carry with it some reimbursement for the costs of their performance. We submit that it is entirely consistent with the First Amendment for a State to defray the cost of services performed *for the State's benefit and at the State's command* by a religious institution.

Assume, for example, that the State of New York decided to conduct an exhaustive census of its elementary school population and of the level of elementary education within the State. Such a survey could be made by sending state officials into each school to gather information. If, to achieve this goal, the legislature decided it was preferable to direct one administrator from each school within the State to come to the State Capitol in Albany with his records for a week-long session in which the information would be gathered, would it be unconstitutional for the State, by payment to the schools, to cover the costs of transportation, room, board and the services of the administrator for one week? The costs which are reimbursed by the present statute are essentially similar to those covered by the above hypothetical. They cover noneducative serv-

ices which are compelled by state law for the efficient administration of the State's responsibilities.

Accordingly, the mere fact that payments are made directly from the public treasury to private schools does not invalidate the New York statute. This Court rejected that "simplistic argument" in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971), noting that it was repudiated as long ago as 1899 in *Bradfield v. Roberts*, 175 U.S. 291. It warrants similar disposition here.

II

THE STATE'S DECISION TO PERMIT SCHOOLS TO EXECUTE THESE ADMINISTRATIVE TASKS ON A REIMBURSABLE BASIS IS A LEGITIMATE MEANS OF AVOIDING "ENTANGLEMENT" AND REFLECTS "BENEVOLENT NEUTRALITY"

The irony of the decision below (and of appellees' contention) is that it will lead to *more* "excessive entanglement" between state administrators and religious schools than results from the Mandated Services Act. Under the state law, each school takes its own attendance, keeps its own student and personnel health records, administers its own examinations, and finally reports to the State. If the Act is invalidated, the only way that the State of New York can remove from the private schools the severe financial burden of these duties is to have them performed by state officials who are full-time state employees. The consequence would be that a state officer would visit the schools regularly—possibly every day—and would arrive at certain intervals to administer standardized tests.

This kind of daily supervision of religiously affiliated schools is exactly what the "excessive entanglement" principle was designed to prevent. State officials will

have to adjust their calendars so as not to arrive on religious holidays and will have to time their visits so as not to interfere with other religious observances. Other kinds of accommodations will have to be made by the schools and by the officials.

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court sustained an exemption of religious property from local taxation on the ground that it constituted "neither the advancement nor the inhibition of religion" (*id.* at 672) and that an exemption "creates only a minimal and remote involvement between church and state and far less than taxation of churches" (*id.* at 676, emphasis added). The Court noted that eliminating the exemption "would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." 397 U.S. at 674.

The same is true here. The New York legislature has chosen, in this law, the route that is least likely to lead to the "intimate and continuing relationship between church and state" that the First Amendment forbids, *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). If that law is invalidated and the legislature is compelled to send state officials into religiously affiliated schools to perform neutral, nonideological administrative tasks, the opportunities for friction and divisiveness are substantially increased.

CONCLUSION

The New York Mandated Services Act is sound in educational theory as well as constitutional principle. It leaves to the private schools the performance of tasks which the State wants to have done for the benefit of its administrators. And it recognizes that while it is uneconomical for state officials to perform these tasks directly, it is unfair for the private schools to bear the costs of their performance. Hence it reimburses the schools for those costs.

The judgment below should be reversed with directions to dismiss the complaint.

Respectfully submitted,

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DEC 29 1972

IN THE

MICHAEL BODAY, JR., CLERK

Supreme Court of the United States**October Term, 1972****Nos. 72-269, 72-270, 72-271**

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the State
of New York,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY et al.,
Appellees;

EARL W. BREYDGES, as Majority Leader and President pro tem
of the New York State Senate,

Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY et al.,
Appellees;

CATHEDRAL ACADEMY et al.,*Appellants,*

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF for APPELLANTS CATHEDRAL ACADEMY,
ST. AMBROSE SCHOOL and BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL**

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	2
Opinions Below	2
Jurisdiction	2
Constitutional Provision and Statute Involved	3
Question Presented	4
Statement of the Case	4
Summary of Argument	7

ARGUMENT

THE MANDATED SERVICES ACT HAS A SECULAR PURPOSE AND PRIMARY EFFECT; IT DOES NOT CHANGE THE LONG-STANDING RELATIONSHIP BETWEEN THE STATE AND NONPUBLIC SCHOOLS UNDER WHICH THE STATE CLOSELY SUPERVISES THE EDUCATION OFFERED BY SUCH SCHOOLS	10
--	----

The Purpose of the Mandated Services Act Is Wholly Secular	11
--	----

The Principal or Primary Effect of the Mandated Services Act Is Neither to Inhibit Nor Advance Religion; It Is to Assure That All School Children in the State Are Receiving Instruction as Required by Law and Are Maintaining Acceptable Levels of Achievement	13
--	----

Nonpublic Schools Have Long Been an Integral Part of Education in New York and the State Historically Has Involved Itself in, and Extensively Regulated, Their Affairs; The Mandated Services Act Reflects This Supervision and Does Not Create Improper Government Entanglement with Religion	16
The Extensive Supervision Exercised by New York State Over Nonpublic Education	17
The Nature of the Aid	24
The Nature of the Schools Receiving Reimbursement	28
The District Court Majority Erred With Respect to the Entanglement Issue	31
Conclusion	35
APPENDIX	
Chapter 138 of the 1970 Laws of New York	1a
Part 176, Regulations of the Commissioner of Education	6a

TABLE OF AUTHORITIES

Cases

	PAGE
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968)	7, 8, 12 14, 18, 19 27, 33
<i>Committee for Public Education & Religious Liberty v. Rockefeller</i> , 322 F. Supp. 678 (S.D.N.Y. 1971)	5, 11, 12
<i>Earley v. DiCenso</i> , 403 U.S. 602 (1971)	3
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947)	14, 19, 33
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	3, 9, 10 14, 16, 31 32, 33, 34
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	14
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	13
<i>Robinson v. DiCenso</i> , 403 U.S. 602 (1971)	3
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	3, 8, 14 15, 16, 27 28, 33
<i>Walz v. Tax Commission of the City of New York</i> , 397 U.S. 664 (1970)	14, 16
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	13

Statutes and Regulations

28 U.S.C. § 1253	3
28 U.S.C. § 1343(3)	2
28 U.S.C. § 2101(b)	3
28 U.S.C. § 2281	2
28 U.S.C. § 2284	2

	PAGE
N.Y. Educ. Law § 207	19
N.Y. Educ. Law § 208	23
N.Y. Educ. Law § 215	19
N.Y. Educ. Law § 216	19
N.Y. Educ. Law § 801-10	22
N.Y. Educ. Law § 3204	7, 19, 21, 22
N.Y. Educ. Law § 3210.2	20
N.Y. Educ. Law § 3211	20, 21
[1892] Laws of N.Y. ch. 378, § 26	17
Regulations of the Commissioner of Education § 101.7 ..	21
Regulations of the Commissioner of Education § 102.2 ..	26
Regulations of the Commissioner of Education § 176.1(b)	23, 25

Other

Encyclopedia of Educational Research (3d ed. 1960)	26
<i>Hearings on H.R. 16141 and Other Pending Proposals Before Committee on Ways and Means, 92nd Cong., 2d Sess., pt. 3 (Sept. 7, 1972)</i>	30
Kelly, <i>The "Nearly Poor Catholics" in New York City,</i> 1 St. John's Univ., N.Y. Research Bulletin (Jan., 1972)	30
State Educ. Dep't, <i>Handbook on Examinations and Scholarships</i> (1968)	22
State Educ. Dep't, <i>Improving the Classroom Test—A Manual of Test Construction Procedures for the Classroom Teacher</i> (1964)	23
State Educ. Dep't, <i>The Secondary School Curriculum of New York State—A Handbook for Administrators</i> (1970)	22

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF for APPELLANTS CATHEDRAL ACADEMY,
ST. AMBROSE SCHOOL and BISHOP LOUGHLIN
MEMORIAL HIGH SCHOOL**

Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School appeal from the judgment of the United States District Court for the Southern District of New York entered on June 1, 1972, permanently enjoining enforcement of Chapter 138 of the 1970 Laws of New York [hereinafter "Mandated Services Act"] which provides for the reimbursement of nonpublic schools for expenses incurred by them in complying with state requirements relating to the maintenance of attendance, health and personnel records, and the administration of tests and examinations.

Opinions Below

The opinion of the majority of the District Court holding the Mandated Services Act to be violative of the Establishment Clause of the First Amendment and the dissenting opinion are reported at 342 F. Supp. 439 *et seq.* Copies of both opinions are also set forth in the Appendix to the Jurisdictional Statement of Appellants Cathedral Academy *et al.* [hereinafter "JS Appendix"] at pages 1a and 14a, respectively. An earlier opinion granting plaintiffs' motion to convene a three-judge district court is reported at 322 F. Supp. 678.

Jurisdiction

This action was commenced pursuant to 28 U.S.C. §§ 1343(3) and 2281, 2284 to enjoin the enforcement of the Mandated Services Act as allegedly being in violation of the Establishment and Free Exercise Clauses of the

First Amendment. The final judgment of the District Court was entered on June 1, 1972. JS Appendix, pp. 18a-19a. A notice of appeal was filed on behalf of appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School on June 30, 1972. On November 6, 1972, this Court noted probable jurisdiction. Appendix, pp. 120a-121a.

This Court has jurisdiction to review the judgment of the District Court by direct appeal under 28 U.S.C. §§ 1253 and 2101(b). The most recent cases sustaining the jurisdiction of this Court to review the judgment in this case on direct appeal are *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

Constitutional Provision and Statute Involved

The First Amendment reads, in pertinent part, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 138 of the 1970 Laws of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor," the full text of which is set forth both in the Appendix to this brief and in the JS Appendix, commencing at page 26a.

Question Presented

Whether the Mandated Services Act, which reimburses religiously-affiliated and other nonpublic schools for the record keeping, reporting and other administrative and evaluative services which they are required to perform under the New York Education Law, violates the Establishment Clause of the First Amendment.

Statement of the Case

The Mandated Services Act was enacted by the New York Legislature to provide partial reimbursement to nonpublic schools for the expenses they incur in providing the numerous services relating to examination and inspection required by state law. Under the Act, nonpublic schools are reimbursed in the amounts of 15 cents per day per pupil in grades 1-6 (or \$27 per year) and 25 cents per day per pupil in grades 7-12 (or \$45 per year). Studies conducted under the auspices of the New York State Education Department, which by stipulation "may be taken as accepted facts for the purposes of this case",¹ show that these amounts are substantially less than the expenses actually incurred by the schools.

Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are nonpublic elementary or secondary schools situated in New York, and, until entry of the District Court's permanent injunction, were recipients of payments pursuant to the Mandated Services Act. They are affiliated with the Roman Catholic Church.

¹ Appendix, p. 91a.

Plaintiffs instituted this suit in the United States District Court for the Southern District of New York against Nelson A. Rockefeller, Arthur Levitt and Ewald B. Nyquist in their respective capacities as Governor, Comptroller and Commissioner of Education of the State of New York, demanding that defendants be permanently enjoined from approving or paying any funds of the State of New York pursuant to the Mandated Services Act to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith. *See Appendix, p. 15a.*

Judge Morris E. Lasker granted a motion to intervene as parties defendant by appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School and by Bais Yaakov Academy for Girls and Yeshivah Rambam. Judge Lasker subsequently granted defendant Rockefeller's motion to dismiss the complaint as to him but denied defendants' motion to dismiss in all other respects and ruled that the complaint raised a substantial federal constitutional question. *See Committee for Public Education & Religious Liberty v. Rockefeller*, 322 F. Supp. 678 (S.D.N.Y. 1971). A three-judge district court, consisting of Judge Lasker, the Hon. Paul R. Hays, U. S. Circuit Judge and the Hon. Edmund L. Palmieri, U. S. District Judge, was duly constituted on February 24, 1971. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion, concurred in by Judge Hays, that the Mandated Services Act violates the Establishment Clause of the First Amendment. The opinion reads, in part, as follows:

... Either the statute falls because a system of surveillance and control would create excessive entangle-

ment, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen. 342 F. Supp. at 444; JS Appendix, p. 11a.

Judge Palmieri dissented, stating that, in his opinion, the Mandated Services Act is

a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. 342 F.Supp. at 445; JS Appendix, pp. 14a-15a.

On June 1, 1972, the judgment appealed from herein was entered, permanently enjoining defendants Levitt and Nyquist "and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools." JS Appendix, p. 19a.

Appellants Levitt and Nyquist, as well as the appellant schools, appealed from the District Court's final judgment. Docket No. 72-269.² Motions for a stay of the injunction pending appeal were denied by the District Court³ and by Mr. Justice Blackmun. This Court's order of November 6, 1962, noting probable jurisdiction, consolidated all three appeals.

² An appeal was also taken by Senator Earl W. Brydges, who was permitted by the District Court to intervene as a defendant by reason of his position as Majority Leader and President pro tem of the New York State Senate. Docket No. 72-270.

³ Judge Palmieri, dissenting.

Summary of Argument

The Mandated Services Act, which is unlike any other statute in the United States, reflects the close supervision which the State of New York has historically exercised pursuant to the compulsory education laws over the education of children in nonpublic schools. There is no unconstitutional involvement or entanglement with religion in New York's efforts to supervise the education of all children and in its effort to partially reimburse nonpublic schools for expenses they incur in meeting state-mandated requirements.

The public and nonpublic schools in the State of New York have long comprised a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education, who are empowered and required to ensure that all the schools in the system give their pupils an adequate education along the lines laid down by statute and by the regulations of the Commissioner. The broad extent to which nonpublic schools in New York are regulated and supervised by state authority was noted by this Court in *Board of Education v. Allen*, 392 U.S. 236 (1968).

The compulsory education statute (N.Y. Educ. Law § 3204) requires all children to attend full-time instruction "at a public school or *elsewhere*." If "*elsewhere*," the instruction given must be "*at least substantially equivalent*" to that given in the public schools of the district where the child resides. To ensure this, statutes and regulations impose a long list of detailed requirements upon nonpublic schools in such fields as attendance, curricula, accredita-

tion, examinations and diplomas. The Regents and the Commissioner have traditionally had the broadest powers of visitation and inspection. Thus, whatever involvement exists between the state and nonpublic schools is due to, and has been carried out as a result of, long-established procedures under the compulsory education laws, *not* the enactment of the Mandated Services Act.

The lead opinion in *Tilton v. Richardson*, 403 U.S. 672 (1971), states that a statute cannot be declared unconstitutional on the basis of a "hypothetical profile", and this Court in *Allen* specifically refused to assume that the religious element in the parochial elementary and secondary schools of the State of New York necessarily permeates the education that they provide. The record in this case (in the form of answers to interrogatories) shows that appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are all affiliated with the Roman Catholic Church, but that none of these three Catholic schools is an integral part of the religious mission of the Church. All are an integral part of the communities in which they are located. Their principal function is education. They do not impose religious restrictions on pupil admissions or on faculty appointments. They do not require their pupils to attend religious activities or to adhere to a particular faith.

The record in this case does not support the conclusion of the majority below that the Mandated Services Act entails excessive entanglement between church and state. No auditing of the books of nonpublic schools is necessary or required because the amounts reimbursed are fixed at levels far below the actual cost of the services involved, as deter-

mined by state education officials. The Act has not given rise to a "comprehensive, discriminating, and continuing state of surveillance". It does not present the potential for excessive involvement or entanglement which led this Court to strike down the teachers' salary supplement statutes in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). First, the services mandated are administrative and noninstructional, such as the maintenance of attendance and health records and the administration of examinations. Second, the requirement for these services originated with the state, long antedated the Act and is intended to benefit the state as the regulating agency and the child whose education is involved, rather than the nonpublic schools which are required to perform these administrative services as a convenience to the state. Third, the costs incurred in providing these services were properly determined by legislative procedures and are substantially below the amount allocated for these same services in public schools. Fourth, the money apportioned pursuant to the Mandated Services Act is done so retroactively, as partial reimbursement for services already rendered, rather than as an advance payment.

The record in this case also does not support the speculation of the majority below with respect to potential divisive political activity. Both the history of the Mandated Services Act and the history of nonpublic education in the State of New York, in general, show a remarkable lack of political divisiveness. The Mandated Services Act received bipartisan support and there has not been any annual legislative appropriation dispute over the Act. Indeed, it is unlikely that such discord could erupt in view of the Act's limited scope and restricted, precise formulas.

ARGUMENT

THE MANDATED SERVICES ACT HAS A SECULAR PURPOSE AND PRIMARY EFFECT; IT DOES NOT CHANGE THE LONG-STANDING RELATIONSHIP BETWEEN THE STATE AND NONPUBLIC SCHOOLS UNDER WHICH THE STATE CLOSELY SUPERVISES THE EDUCATION OFFERED BY SUCH SCHOOLS

In *Lemon v. Kurtzman*, this Court summarized the tests applicable to a determination of constitutionality under the Establishment Clause:

... Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion" . . . 403 U.S. at 612-13.

None of the three judges in the District Court found that the Mandated Services Act has a sectarian purpose or that its principal or primary effect is the advancement of religion.* The decision of the majority of the District Court was based on a conclusion that the Act was unconstitutional for entanglement reasons, a point which we discuss below.

* The Mandated Services Act had been fully enforced for the better part of two school years before the District Court was called upon to act upon appellees' claim(s) for relief, and the court therefore had more than appellees' hypotheses about the Act upon which to gauge the tests with respect to the Act's purpose and effects.

The Purpose of the Mandated Services Act Is Wholly Secular

The Mandated Services Act was based upon a legislative finding that:

... the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

Judge Lasker stated in his opinion granting the motion to convene the three-judge District Court below that:

We may admit that the statute's purpose is not offensive. The objectives of assuming that New York's

"precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century" is beyond question a worthy and legitimate legislative concern.⁵

The purpose of the Mandated Services Act, as shown by the legislative preamble, was to implement the state's long-standing policy of requiring nonpublic schools to be conducted on a basis substantially comparable to that of the public schools with respect to the non-religious aspects of their operations. The Legislature recognized that the state had imposed upon nonpublic schools certain requirements as to curricula, attendance, examination and testing, and record-keeping and that it was only fair that the state should compensate these schools for the expenses incurred in meeting these state-mandated obligations. This does not advance religion in any conceivable way. It does not intrude into the instructional or educational process. It simply requires the state to pay part of the administrative expenses mandated by law.

The New York Legislature has clearly set forth the purpose of the Mandated Services Act, and it readily reflects the state's continuing, legitimate concern for maintaining minimum standards in all schools which educate New York children. This concern on the part of New York has already found constitutional acceptance in *Allen*. In holding the New York Textbook Loan Act constitutional in *Allen*, this Court stated:

... [I]f the State must satisfy its interest in secular education through the instrument of private schools,

⁵ *Committee for Public Education & Religious Liberty v. Rockefeller*, 322 F. Supp. 678, 683 (S.D.N.Y. 1971).

it has a proper interest in the manner in which those schools perform their secular educational function. 392 U.S. at 247.

The Principal or Primary Effect of the Mandated Services Act Is Neither to Inhibit Nor Advance Religion; It Is to Assure that All School Children in the State Are Receiving Instruction as Required by Law and Are Maintaining Acceptable Levels of Achievement

New York cannot require all children to attend public schools. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). On the other hand, the state properly can and does require that the instruction given children attending nonpublic schools must be "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools". As described below at pages 17 to 24, it has enacted various statutes and promulgated numerous regulations to assure that minimum standards of education are maintained. The Mandated Services Act reimburses nonpublic schools for the expenses incurred in assuring compliance with such regulations and requirements.* The principal or primary effect of the Mandated Services Act therefore is the assurance that work entailed in the keeping of records and testing considered necessary by the

*The funds provided to nonpublic schools under the Mandated Services Act represent a very small fraction of the budgets of the schools, the great bulk of which budgets is necessarily used in providing the education which these schools are legally required to give. Indeed, Judge Lasker stated on the record that the sums involved under the Act seemed to him to be "so small". Transcript of Proceedings of June 20, 1972, p. 13, Doc. No. 45, Record on Appeal.

state is, in fact, done in a proper manner. Any benefit to the schools is incidental to the carrying out of the state's regulatory functions.

The crucial question with respect to the effect of a statute in a case such as this "is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal or primary effect* advances religion." *Tilton v. Richardson*, 403 U.S. at 679 (emphasis added).

In *Tilton*, a majority of this Court concluded that the construction of certain buildings on the campuses of four Catholic colleges in Connecticut with the aid of public funds did not have as its principal or primary effect the advancement of religion. Similarly, this Court concluded in *Allen* that the primary effect of the New York Textbook Loan Act neither advanced nor inhibited religion. See 392 U.S. at 243. See also *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 672 (1970). This Court reached similar conclusions with respect to Maryland's Sunday closing laws [see *McGowan v. Maryland*, 366 U.S. 420 (1961)] and the New Jersey bus transportation statute upheld in *Everson v. Board of Education*, 330 U.S. 1 (1947). Indeed, even in the *Lemon v. Kurtzman* and *DiCenso* cases where this Court concluded that the Pennsylvania and Rhode Island statutes were constitutionally unacceptable, that conclusion was not based upon any determination that the principal or primary effect of those statutes was the advancement of religion. In fact, the District Court in *Lemon v. Kurtzman* had specifically found that the primary effect of the Pennsylvania statute was not the advancement of religion. See 310 F.Supp. at 46.

In his opinion in *Tilton*, Chief Justice Burger stated:

The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid those institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

If, as indicated in these cases, public funds may be used constitutionally for the reimbursement of expenses not required by state law to be incurred by nonpublic schools or parents, such as bus transportation, buildings or textbooks, it would be wholly incongruous to outlaw the use of state funds for the reimbursement of expenses caused by requirements imposed by state law. If the principal or primary effect of the provision of public funds for the construction of school buildings, the payment of bus transportation and the purchase of textbooks is not the advancement of religion (none of these being publicly mandated by law), then it is inconceivable that the principal or primary effect of the provision of public funds for reimbursement of the expenses of publicly-mandated services such as maintenance of attendance and other records could be the advancement of religion.

Nonpublic Schools Have Long Been an Integral Part of Education in New York and the State Historically Has Involved Itself in, and Extensively Regulated, Their Affairs; The Mandated Services Act Reflects This Supervision and Does Not Create Improper Government Entanglement with Religion

In developing the "entanglement" test, this Court has stressed that some entanglement between church and state is unavoidable and that only *excessive* entanglement is unconstitutional. As stated in *Walz v. Tax Commission of the City of New York*:

No perfect or absolute separation [between religion and government] is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement. 397 U.S. at 670.

In *Lemon v. Kurtzman*, this Court explained the factors which must be explored to ascertain if, in fact, there is excessive entanglement:

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. 403 U.S. at 615.

But, "[n]o one of these three factors standing alone is necessarily controlling," *Tilton v. Richardson*, 403 U.S. at 688. It is their combination which is decisive.

Testing the Mandated Services Act by these criteria, there is no unconstitutional entanglement between government and religion.

*The Extensive Supervision Exercised by
New York State Over Nonpublic Education*

All of the educational enterprises in New York have been integrated since 1784 in The University of the State of New York, the oldest continuous state educational administrative agency in the United States. The University, headed by the Board of Regents, encompasses all elementary and secondary schools and higher institutions of learning, public and private, as well as all museums, historic sites and libraries. The New York approach to education has been unique, and the Mandated Services Act is unlike any other statute in the United States.⁷

The public and nonpublic schools in the State of New York comprise a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education,⁸ who are empowered and required to ensure that all the schools in the system give their pupils an adequate education along the lines laid down by statute and

⁷ The function of the Act, however, is not unique in the State of New York. For example, from 1892 through 1968, state monies were apportioned to nonpublic schools in compliance with state rules and regulations. *See, e.g.,* An Act to Revise and Consolidate the Laws Relating to the University of the State of New York, [1892] Laws of N.Y. ch. 378, § 26.

⁸ Under New York law, the Board of Regents, which is composed of 15 members, heads the State Education Department. The Board's chief administrative officer is the Commissioner of Education, who is appointed by the Regents. With the exception of the Deputy Commissioner, all other officers and employees of the Education Department are appointed by the Commissioner, subject to approval by the Regents.

by the regulations of the Commissioner. The broad extent to which nonpublic schools in New York are regulated and controlled by state authority with respect to the secular aspects of their operation was noted by this Court in *Allen*. Citing several sections of the New York Education Law,* this Court put the matter of state regulation of nonpublic schools in the following terms:

... Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a "public purpose", and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana's interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: "[The State's] interest is education, broadly; its

* See 392 U.S. at 246 n. 7.

method, comprehensive. Individual interests are aided only as the common interest is safeguarded.”¹⁰

Section 207 of the New York Education Law sets forth the legislative authority which the Board of Regents has been granted “concerning the educational system of the state” to “determine its educational policies” and to “establish rules for carrying into effect the laws and policies of the state relating to education.” The broad scope of this responsibility is indicated by the section’s very limited exception which removes from the authority of the Regents only those educational programs in New York relating solely to the religious training of clergymen. Section 215 of the Education Law provides:

The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.¹¹

The compulsory education statute (N.Y. Educ. Law § 3204) requires all children to attend full-time instruction

¹⁰ 392 U.S. at 245-47 (footnotes 7, 8 omitted). See also *Everson v. Board of Education*, 330 U.S. 1, 17 (1947).

¹¹ Section 216 of the Education Law empowers the Regents to charter, on such terms as they may prescribe, all institutions in the field of education, public and nonpublic alike. The Regents can also suspend or revoke the charter of any such institution.

"at a public school or *elsewhere*." If "elsewhere," the instruction given must be "*at least substantially equivalent*" to that given in the public schools of the district where the child resides. To ensure this, statutes and regulations impose a long list of detailed requirements upon nonpublic schools in such fields as attendance, curricula, examinations, accreditation and diplomas.

Exhibit C of the Supplement to Appendix sets forth extracts of most of the provisions of the Education Law and the regulations of the Commissioner of Education relating to attendance. Section 3210.2 of the New York Education Law reads, in part, as follows:

Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

Section 3211 ("Records of attendance upon instruction") provides that:

... The teacher of every minor required by the provisions of part one of this article to attend upon instruction . . . shall keep an accurate record of the attendance and absence of such minor . . .

3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of records of attendance of minors required to be kept . . . and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the instruction upon which a minor attends . . . shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. . . .¹²

State supervision of the curricula of nonpublic schools is equally as comprehensive. Section 3204.3 states:

Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government in the Declaration of Independence and established by the constitution of the United States. . . .

¹² See also Regulations of the Commissioner of Education § 101.7.

These curricula requirements are made applicable to non-public schools pursuant to N.Y. Educ. Law § 3204.2, *supra*. In addition to providing instruction in accordance with Section 3204, all nonpublic schools must provide instruction in a number of other specified areas. See N.Y. Educ. Law §§ 801-10. Indeed, so pervasive is the supervision of non-public schools by the State of New York that, for example, when such schools desire to offer a course for which there is no state-prepared syllabus, they "need to apply to the Bureau of Secondary Curriculum Development for approval if the course is to be given Regents credit." State Educ. Dep't, *The Secondary School Curriculum of New York State—A Handbook for Administrators* 6 (1970).

Nonpublic schools, as well as public schools, administer numerous state-prescribed examinations, including the so-called PEP (Pupil Evaluation Program¹³) tests, Regents examinations and Regents Scholarship examinations.¹⁴ On

¹³ "The Elementary and Secondary Education Act of 1965 requires the annual use of objective measures to evaluate its role in improving pupil achievement. Towards that end, the Department [of Education] has established a statewide testing program to assess the achievement status of every pupil in selected grades in New York State. Each fall, *all public and nonpublic schools* in the State administer the following tests:

Grades 3 and 6 _____	Reading Test for New York State Elementary Schools, Form A Arithmetic Test for New York State Secondary Schools, Form A
Grade 9 _____	Minimum Competence Test in Read- ing for New York State Secondary Schools Minimum Competence Test in Arith- metic Fundamentals for New York State Secondary Schools"

State Educ. Dep't, *Handbook on Examinations and Scholarships* 29 (1968) (emphasis added).

¹⁴ For a detailed description of all of the various state examinations, see generally the *Handbook* *ibid*.

the other hand, "[i]mportant as Regents examinations and standardized tests are in the total school testing program, the backbone of day-by-day evaluation in the school is the classroom test." State Educ. Dep't, *Improving the Classroom Test—A Manual of Test Construction Procedures for the Classroom Teacher* 5 (1964). In view of this, non-public schools are required to

conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.¹⁵

Nonpublic schools are also required to maintain records relating both to the qualifications and characteristics of their teaching personnel and to the health of their pupils. In sum, the regulation of nonpublic education by the State of New York is so complete and its equivalency to public education so well accepted that a graduate of a religiously-affiliated high school obtains his diploma, not from his school, but rather from the State Board of Regents. See N.Y. Educ. Law § 208.

The Mandated Services Act did not establish a relationship of supervision and control by the State of New York over its nonpublic schools where none existed before or where such relationships, on their face, are constitutionally impermissible. This relationship was created by the vari-

¹⁵ Regulations of the Commissioner of Education § 176.1(b). For an updated compilation of regulations of the Commissioner relating to nonpublic schools, see the Appendix to this brief, pp. 6a-7a. Cf. Exhibit E, Supplement to Appendix.

ous statutes, rules and regulations imposing attendance, curricula and other requirements on nonpublic schools in order to satisfy the state's clear interest in maintaining and improving educational standards for all children. The Act merely assures full compliance therewith.

The Nature of the Aid

The Mandated Services Act provides for reimbursement of nonpublic schools for the expenses of services incurred by them as a result of state requirements connected with administration, grading and compiling of the results of tests and examinations, maintenance of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics, and the preparation and submission to the State of various other reports as provided for or required by law or regulation. The reimbursement formulas for such services are 15 cents per day per pupil in grades 1-6 (or \$27 per year) and 25 cents per day per pupil in grades 7-12 (or \$45 per year). In view of state studies, which by stipulation are accepted fact in this case,¹⁶ showing the actual costs of the state-mandated services per pupil per year, it is clear that the reimbursement covers only a part of the expenses incurred by nonpublic schools. *See* Exhibit D, Supplement to Appendix. No audit is provided for because none is needed in view of the limited nature of the reimbursement. As Judge Palmieri pointed out below:

... The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides ade-

¹⁶ *See* Appendix, p. 91a.

quate assurance that government funds are not available for examination functions peculiar to religious institutions. 342 F. Supp. at 445; JS Appendix, p. 15a.

Looking separately at the various types of services for which reimbursement is made, it is impossible to find any sectarian features in the costs associated with the maintenance of attendance records, health data and other such information. Nor can it be reasonably concluded that costs incurred in connection with examinations prepared by state officials, such as the Regents Examinations, serve a sectarian purpose. Yet the District Court has declared reimbursement for such expenses to be an unconstitutional establishment of religion. We submit that this is clearly erroneous.

Similarly, an evaluation of the expenses attributable to examinations prepared and administered by the nonpublic schools themselves in the various subjects required by state law does not lead to the conclusion reached by the District Court majority. First, the District Court majority disregarded the fact that Commissioner's Regulation § 176.1(b) specifically requires nonpublic schools to "conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement." Section 2 of the Mandated Services Act reads:

There shall be apportioned annually by the commissioner to each qualifying school . . . amounts . . . for expenses of services for examination and inspection in connection with administration, *grading and the compiling and reporting of the results of tests and examinations*, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications

and characteristics and the preparation and submission to the state of various other reports as *provided for or required by law or regulation*. (emphasis added)

There can thus be no question but that tests referred to by the District Court are mandated by New York law. Secondly, the District Court majority disregards the state's primary interest in testing as the fundamental tool in evaluating levels of achievement. Tests and examinations, terms used interchangeably, ordinarily are used to refer to a "series of questions or tasks designed to measure the knowledge or skill of an individual." Encyclopedia of Educational Research 1502 (3d ed. 1960). The importance of assessment or evaluation in the educational process is well-recognized. From earliest times, tests have been a basic means of measuring educational progress. Horace Mann introduced wide-scale testing programs as aids in the maintenance and improvement of educational standards. J. M. Rice developed objective tests for use in his surveys of school accomplishments, and Lindquist designed tests to measure the basic and ultimate outcomes of an educational program. *Cf. id.*

The state is vitally interested in levels of achievement, and it has a duty to determine that nonpublic school pupils are receiving an education *substantially equivalent* to that provided in public schools. Of all of the methods used to determine this, including curricula contents, teacher qualifications, facilities and equipment, class size, testing is the most important. Indeed, the state requires the same continuing program of individual pupil testing in the public schools. See Regulations of the Commissioner of Education § 102.2. In short, testing is an integral part of the state's continuing effort to assure that both public and

nonpublic schools are maintaining appropriate levels of educational achievement.

Certainly, one of the most important types of testing is the routine classroom test prepared and administered by classroom teachers to measure levels of proficiency and improvement on a frequent basis. Such examinations are just as significant in the educational process, if not more so, as the annual Regents examinations or the periodic PEP tests prepared by state officials. To conclude, as the District Court majority did, that reimbursement for such expenses is unconstitutional because "testing is an integral part of the teaching process"¹⁷ wholly ignores the fact that nonpublic schools play "a significant and valuable role in raising national levels of knowledge, competence, and experience" and that they "are performing, in addition to their sectarian function, the task of secular education." *Board of Education v. Allen*, 392 U.S. at 247, 248. Nonpublic school examinations are therefore comparable to those given in public schools and cannot be dismissed as indirect efforts to inculcate religion. To say that reimbursement for classroom testing is impermissible because such testing may involve the furtherance of sectarian views is not only unsupported by the record in this case; it asks this Court to accept the premise that religious teaching in the New York nonpublic schools permeates their secular functions. This Court has consistently refused to accept this unproven premise. See *Board of Education v. Allen*; *Tilton v. Richardson*, 403 U.S. at 681. There is no basis for accepting in this case such an erroneous view of the function of nonpublic education in New York.

¹⁷ 342 F. Supp. at 444; JS Appendix, p. 12a.

*The Nature of the Schools
Receiving Reimbursement*

Despite this Court's admonition in *Tilton* against striking down legislation on the basis of a "hypothetical profile,"¹⁸ the majority of the District Court did, in fact, rely on such a profile when it stated that "there is no question as to the character and purposes of the institutions which are benefited." 342 F. Supp. at 445; JS Appendix, p. 9a.

The only evidence in the record on the point deals with the five schools which are before this Court. No clear pattern is evident as to these schools.

As noted above, appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are all affiliated with the Roman Catholic Church. Not one of these three schools, however, is an integral part of the religious mission of the Church. All are an integral part of the communities in which they are located. Their principal purpose is education. They do not impose religious restrictions on pupil admissions or on faculty appointments. They do not require their pupils to attend religious activities or to adhere to a particular faith. *See generally* Appendix, pp. 61a-84a.

These schools are obviously only a few of the religiously-affiliated nonpublic schools in New York. The record is silent as to the extent and details of the religious affiliations of other schools. However, there is some available data showing the diversity among them which make inappropriate the type of generalizations indulged in by the District Court majority. As of the fall of 1968, there were 1,415 Roman Catholic, 164 Jewish, 59 Lutheran, 49 Episcopal, 37 7th Day Adventist and 18 other religiously-affili-

¹⁸ 403 U.S. at 682.

ated nonpublic schools¹⁹ in New York. There are also 296 nonpublic schools with no religious affiliations. *See Exhibit I, p. 3, Supplement to Appendix.* Thus, while a majority of New York nonpublic schools are affiliated with the Catholic Church, there are a substantial number (623) of such schools which are affiliated with other religious organizations or none at all.²⁰

In 1968-69, well over half (61.6 percent) of the pupils enrolled in nonpublic schools in New York State attended schools in the "Big Six" cities of Albany, Buffalo, New York, Rochester, Syracuse and Yonkers. . . . New York City alone had slightly more than half the enrollment (51.4 percent), and an additional 10.2 percent was accounted for by the other large cities (Buffalo, 4.3 percent; Rochester, 1.9 percent; Albany, 1.5 percent; Yonkers, 1.3 percent; Syracuse 1.2 percent).²¹

Since a majority of New York nonpublic schools are located in the City of New York and are affiliated with the Roman Catholic Church, a look at the makeup of such schools in New York City is perhaps revealing.²² For ex-

¹⁹ Includes schools affiliated with Society of Friends, Mennonite, Greek Orthodox, Russian Orthodox, Methodist and Baptist churches.

²⁰ The District Court majority's error in summarily equating nonpublic education with religion is further exemplified by the language of its permanent injunction, which also enjoins Mandated Services Act payments to the 296 nondenominational schools, even though such payments could not, under any circumstances, be construed to violate the Establishment Clause, a fact which appellants herein pointed out to the District Court.

²¹ Exhibit I, p. 4, Supplement to Appendix.

²² In addition to Bishop Loughlin Memorial High School, there is data in the record of this case with respect to 16 other specifically named Catholic elementary and secondary schools located within the City of New York. *See Affidavits numbered 9, 12, 17, 18, 19, 20, 21, 22, 23, 24, 32, 33, 34, 35, 36 and 38, Appendix F, Doc. No. 49, Record on Appeal.*

ample, out of 65,937 pupils enrolled last year in Catholic elementary schools in the Bronx, New York and Richmond counties, 30,992 were non-white. "Today, more than sixty percent of [Catholic nonpublic school] elementary school students in Manhattan are Black or Spanish-speaking; thirty percent in the Bronx." *Hearings on H.R. 16141 and Other Pending Proposals Before Committee on Ways and Means*, 92nd Cong., 2d Sess., pt. 3, at 583 (Sept. 7, 1972). As for the parents of these children:

... The father is usually a blue or white collar worker, more frequently found in the unskilled area of work than performing professional tasks. He is in a stable marriage union to a woman who works at home. The mother seems to move into the market place as a full time worker when she sends her children to Catholic high school. These Catholic school parents in New York City, far from being affluent, earn a modest income . . .

The take-home pay of such families illustrates the economic struggle going on within these homes. About one quarter took home less than \$100 per week and more than three out of every five families (62 per cent) cleared less than \$150.00. In some New York counties, where large numbers of Negroes and Spanish had children in parochial schools, the economic picture was somewhat darker. In Manhattan, for example, 41 per cent reported less than \$100 weekly and 77 per cent less than \$150.²³

Out of 4,704 teachers in the elementary schools under the auspices of the Archdiocese of New York in 1971-72, over 60 percent (2,844) were lay teachers. About 50 percent (1,356 out of 2,274) of the teachers in the high schools in the Archdiocese during the past school year were laymen.

²³ Kelly, *The "Nearly Poor Catholics" in New York City*, 1 St. John's Univ., N.Y. Research Bulletin 2 (Jan., 1972).

The composition of Catholic nonpublic schools in the other urban areas of the State of New York is substantially similar. Appellant Cathedral Academy, for example, which is located in a federally designated poverty area of Albany, has a total enrollment of 513 pupils; 235 are black, 231 are *not* Catholic. See Brief for Intervenor-Defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School, p. 9, Doc. No. 27, Record on Appeal. In short, whatever the composite profile of nonpublic schools in the State of New York might be, it is by no means that portrayed in the majority opinion herein, and it was error for the District Court majority to have accepted and relied on this wholly unfounded formulation, one which was specifically contradicted by the answers to interrogatories of the nonpublic schools actually before the court.

The District Court Majority Erred With Respect to the Entanglement Issue

The District Court majority erred in its reliance on *Lemon v. Kurtzman* and in concluding that *any* involvement of the state with nonpublic schools is equivalent to the *excessive* or *unreasonable* entanglement between government and religion which this Court has held to be unconstitutional.

The majority opinion of the District Court relies primarily on the decision of this Court in *Lemon v. Kurtzman*. But that decision dealt specifically with a Pennsylvania enactment providing for that state's payment of parochial schoolteachers for teaching mathematics, modern foreign languages, physical science and physical education and a Rhode Island statute providing for the payment by that state of salary supplements to parochial schoolteachers in the amount of 15 percent of their salaries. Clearly, neither

law examined in *Lemon v. Kurtzman* had anything to do with the neutral, nonideological services required of, and provided by, all schools, public and nonpublic alike, and which are within the purview of the Mandated Services Act. Indeed, this Court took specific note of the fact in *Lemon v. Kurtzman* that its "decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." 403 U.S. at 616-17. Judge Palmieri, in dissent in the case at bar, stated:

... It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U.S. 644 (1970). If, as the Supreme Court pointed out in *Allen*, *supra*, at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman* and *Earley v. Di-Censo*, 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with

religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* . . . 342 F. Supp. at 446, JS Appendix, pp. 16a-17a (footnote omitted).

In holding the Pennsylvania statute in *Lemon v. Kurtzman* unconstitutional, for example, this Court stressed that the state's "post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." 403 U.S. at 621-22. No auditing of the books of nonpublic schools is provided for or required by the Mandated Services Act, because the record shows that the amounts reimbursed are substantially less than the cost to the nonpublic schools of performing the services. The District Court majority's prediction as to the probable future need for a state audit to prevent overpayment to the schools is unwarranted speculation in view of this record. Furthermore, the Act has not given rise to a "comprehensive, discriminating, and continuing state of surveillance," something which this Court found to be inevitably required in *Lemon v. Kurtzman*. See 403 U.S. at 619. Whatever surveillance is involved herein has existed and been carried out as a result of the long-established procedures under the compulsory education laws, not the enactment of the Mandated Services Act. In short, insofar as any new relationship between the State of New York and nonpublic schools arose as a result of the Act, that relationship is no more significant or entangled than those found constitutionally acceptable in *Everson, Allen* and *Tilton*.

The District Court majority not only misinterpreted *Lemon v. Kurtzman*, it also failed to consider this Court's repeated statements that some involvement between government and religion is unavoidable and permissible and that involvement becomes unconstitutional only when it is "unreasonable" or "excessive". As discussed above, any involvement herein is due to the historic supervisory role of the State of New York over nonpublic education, not to the Mandated Services Act. Such involvement, based on the state's undoubted power to supervise all education within its borders, can hardly be considered as "excessive" or "unreasonable". The majority opinion below disregarded this historic relationship.

Nor does the Act present a potential for later excessive involvement or entanglement. First, the services mandated are administrative and noninstructional. Second, the requirement for these services originated with the state, long antedated the Act and is intended to benefit the state as the regulatory agency and the child whose education is involved, rather than the nonpublic school which is required to perform these services as a convenience to the state. Moreover, the amounts reimbursed are substantially below the actual expense of performing these services, as shown by state studies. Finally, the money is paid retroactively as reimbursement for services rendered, rather than in advance.²⁴ Considering all these factors, the conclusion of the District Court majority was erroneous.

The record in this case also does not support the District Court majority's speculation with respect to divisive

²⁴ A nonpublic school applying for payment must submit proof that it provided all of the services mandated. See generally Form SA-170, Exhibit H-1, Supplement to Appendix.

political activity. See 342 F. Supp. at 444-45; JS Appendix, p. 12a. Indeed, both the history of the Mandated Services Act and the history of nonpublic education in the State of New York, in general, show a remarkable lack of political divisiveness. Certainly, differences of opinion are part of the American political process. But divisiveness, in the negative context of the word, has been all but non-existent with respect to the Mandated Services Act. There has not been any annual legislative appropriation dispute over the Act. Furthermore, there hardly could be such discord in view of the Act's limited scope and restricted, precise formulas.

Conclusion

The Mandated Services Act is in all respects constitutional, and the judgment appealed from should be reversed with a direction to the District Court to dismiss the complaint.

Dated: December 28, 1972

Respectfully submitted,

PORTER R. CHANDLER

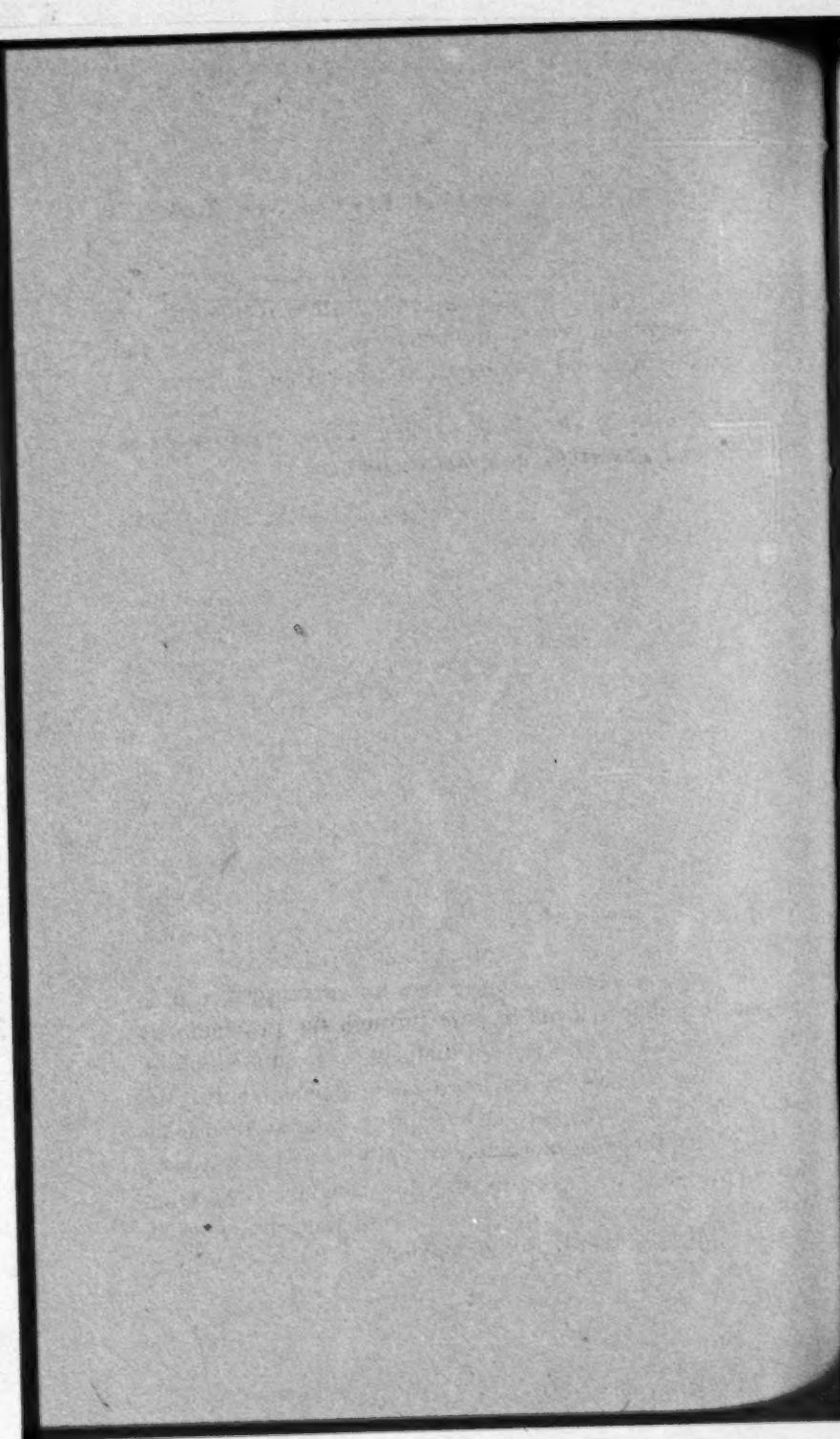
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Chapter 138 of the 1970 Laws of New York**AN ACT**

To provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state pur-

Chapter 138 of the 1970 Laws of New York

poses are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such re-

Chapter 138 of the 1970 Laws of New York

duction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid

Chapter 138 of the 1970 Laws of New York

required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

Chapter 138 of the 1970 Laws of New York

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect September first, nineteen hundred seventy.

PART 176

Apportionments to Nonpublic Schools in Connection with Examination and Inspection

Section 176.1. *Qualification.* To qualify for apportionments of State monies in connection with examination and inspection pursuant to the provisions of Chapter 138 of the Laws of 1970, a nonpublic school shall meet each of the following requirements:

(a) All teachers serving on the staff of such school shall either possess a valid teacher's certificate issued by the commissioner, or shall be certified by the chief administrative officer of such school as meeting all the requirements of such school for the position in which the teacher serves.

(b) Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.

(c) Such school, if it offers instruction at the secondary level (any of the grades seven through twelve) shall submit annually to the State Education Department, at such time and in such form as the commissioner may require, a *Secondary School Report* (Private Schools).

(d) Such school shall submit annually to the State Education Department, at such time and in such form as the commissioner may require, a *Report of Nonpublic Schools* (Basic Educational Data System).

(e) Such school shall submit to the State Education Department, at such times and in such form as the commissioner may require, such additional information as may be specified by the commissioner pursuant to the provisions of Education Law section 215.

(f) Such school shall maintain, in a form and manner specified by the commissioner, a register of the attendance of each pupil enrolled in the school. All such registers shall be retained by the school for a period of not less than fifty years following the close of the school year for which each such register was maintained, and shall be made available for inspection by authorized representatives of the State Education Department upon request. Summaries of such attendance registers shall be submitted annually to the State Education Department at such time and in such form as the commissioner shall prescribe.

(g) Such school shall be organized and conducted solely for educational purposes, and no part of its assets or income shall be distributable to or enure to the benefit of any shareholder, director, officer or employee, except for reasonable compensation for services rendered. If such school is a corporation, it shall possess a valid and current certificate of exemption from taxation issued pursuant to United States Internal Revenue Code Section 501 (c) (3).

Section 176.2. *Application for apportionment.*

(a) Each application by a nonpublic school for an apportionment of State monies in connection with examination and inspection pursuant to Chapter 138 of the Laws of 1970 shall be submitted to the State Education Department at such time and in such form as the commissioner shall prescribe, and shall certify that throughout the "base year," as defined in Chapter 138, the school did in all respects comply with, and during the "current year," as defined in Chapter 138, the school will comply with all the provisions of Education Law sections 313, 801 through 811, 3204 and 3210, paragraph 2, to the extent that such provisions are applicable to a school offering instruction in the grades conducted by the school submitting such application.

(b) A school which elects to be considered a religious or denominational educational institution for the purposes of Education Law section 313 shall submit to the State Education Department, with the application referred to in subdivision (a) of this section, a certification, in the form prescribed by the commissioner, pursuant to the provisions of paragraph (4) of section 313 of the Education Law.

Section 176.3. *Payment of apportionments.*

(a) Apportionments to a qualifying school which is incorporated by the Board of Regents or pursuant to a general or special law shall be paid to the corporation.

(b) Apportionments to a qualifying school which is not incorporated shall be paid, on behalf of such school, to a corporate body, designated by such school and approved by the commissioner, whose corporate purposes include the supervision or support of such school, or if there is no such corporate body, to a corporation authorized to do business in this state which is designated by such school, with the approval of the commissioner, for the purpose of receiving such payments for the benefit of such school.

APPELLEES

BRIEF

9
IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-269, 72-270, 72-271

Supreme Court, U. S.
FILED

JAN 15 1973

MICHAEL RODAK, JR., CL

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

EARL W. BRYDGES, as Majority Leader and President pro tem
of the New York State Senate,

Appellant,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

CATHEDRAL ACADEMY, *et al.*,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

BRIEF FOR APPELLEES

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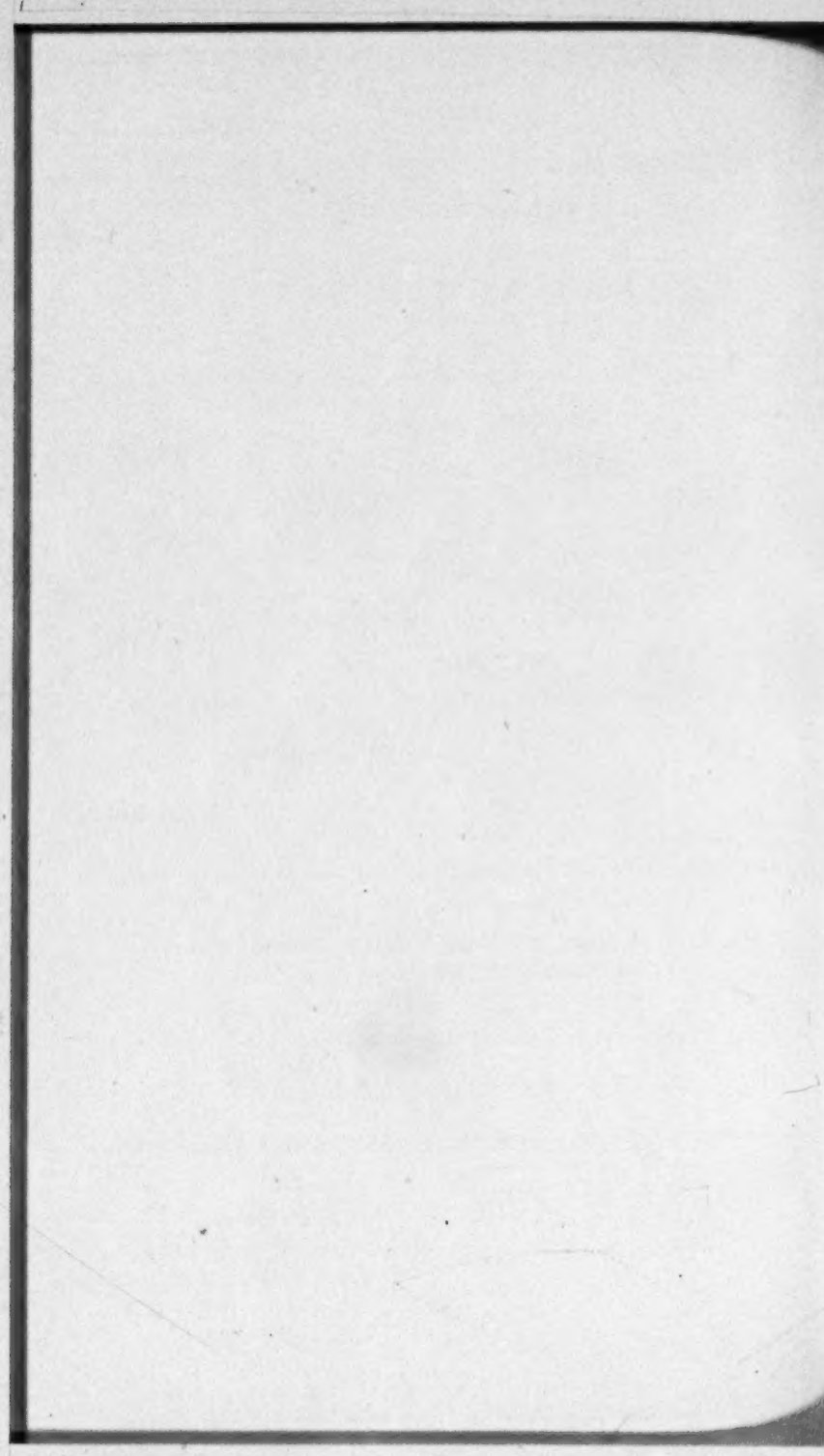


TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement of the Case	2
A. The Act	2
B. The Background of the Act	3
C. The Application of the Act	4
1. Eligibility	4
2. Reporting and accounting	4
3. Relationship of sums received to actual expenditures for mandated services	5
4. The relationship of examination costs to other costs	5
5. Accountability for excess of grant over expenditures	6
Summary of Argument	6
Argument	
I—The statute challenged herein is unconstitu- tional on its face as violative of the Establish- ment Clause of the First Amendment	7
A. The Frame of Reference	7
B. Governmental Subsidization of Sectarian Schools	8
C. Government Entanglement with Religion	12
D. Purpose and Effect	13

	PAGE
II—The construction and application of the Act by the defendants-appellants renders it unconstitutional as violative of the Establishment Clause of the First Amendment	15
A. Use of Statutory Funds Wholly for Religious Worship or Instruction	15
B. Use of Statutory Funds in Part for Religious Worship or Instruction	18
C. Testing as Teaching	22
Conclusion	27

TABLE OF AUTHORITIES

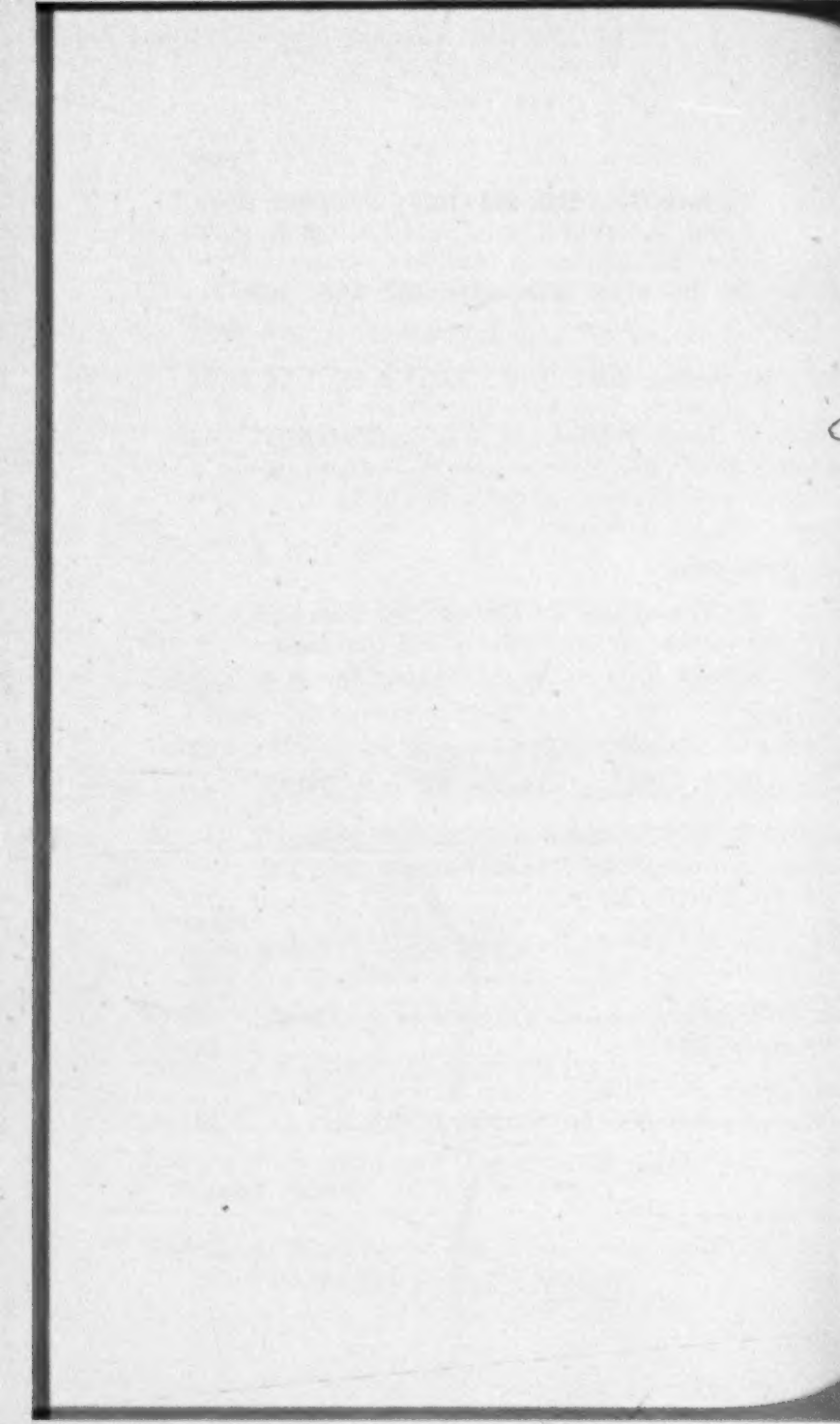
Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963)	13, 14
Americans United for Separation of Church and State v. Oakey, 339 F. Supp. 545 (U.S. D.C., Vt. 1972)	9
Board of Education v. Allen, 392 U.S. 236 (1968)	8, 9, 10, 14, 23
Committee for Public Education and Religious Liberty, <i>et al.</i> v. Nyquist, decided June 1, 1972	12
Earley v. DiCenso, 403 U.S. 602 (1971)	9, 10, 11, 12, 13, 15, 16, 17, 26
Everson v. Board of Education, 330 U.S. 1 (1947)	8, 9, 10, 23
Johnson v. Sanders, 319 F. Supp. 421 (U.S. D.C. Conn.), affirmed 403 U.S. 955 (1971)	8, 9, 10
Kosydar v. Wolman, — F. Supp. — (U.S.D.C. S.D. Ohio, decided December 29, 1972)	9

Lemon v. Kurtzman, 403 U.S. 602 (1971)	8, 9, 11, 12, 13, 16, 17, 25
McCollum v. Board of Education, 333 U.S. 203 (1948)	8, 14, 23
Tilton v. Richardson, 403 U.S. 672 (1971)	8, 10, 11, 16, 21, 23
Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972)	8
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IN THE
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**On Appeal from the United States District Court
for the Southern District of New York**

BRIEF FOR APPELLEES

Question Presented

May a State, consistent with the First Amendment to the United States Constitution, appropriate tax-raised funds to parochial schools to compensate them for expenses incurred in keeping records and conducting tests?

Statement of the Case

A. The Act

This is a taxpayers' suit challenging the constitutionality under the First Amendment of Chapter 138 of New York Laws of 1970 (hereinafter referred to as the Act) which appropriated \$28,000,000 for the school year 1970-71 (Section 7), and corresponding sums for ensuing years, to pay for certain services performed by nonpublic schools. These services are set forth in the Act (Section 2) as "administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission of the state of various other reports as provided for or required by law or regulation."

The formula according to which the funds are to be apportioned among the schools is based on the number of pupils in each school, \$27 being paid for each pupil in grades 1 through 6, and \$45 for each in grades 7 through 12 (Section 2).

Section 8 of the Act provides that "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." However, nothing in the Act requires or makes any provision for the return to the State of any sums paid in excess of the amounts expended by the schools for the statutorily designated purposes, nor does the Act require the schools to report or account for the funds.

B. The Background of the Act

The Act was submitted to the Legislature by the Governor, and how the formula of \$27 and \$45 per pupil was arrived at is something of a mystery. One thing is certain: it did not come, as one would expect it would, from the professional expertise of the Department of Education. In response to an Interrogatory (No. 1) propounded to the defendants-appellants, the Commissioner of Education answered as follows:

That prior to the enactment of Chapter 138 of the Laws of 1970, a conference was held in which representatives of the Office of the Counsel to the Governor, of the Division of the Budget in the Executive Department and of the State Education Department participated; that at said conference the representatives of the State Education Department were asked whether the dollar amount in question was reasonable and that the answer was that to the best of their judgment the amount was reasonable; that no record of the conference was made (App. 85a-86a).

The most reasonable if not only explanation for the formula is the following. Contemporary newspaper accounts indicated that in response to pleas of dire need from religious school authorities the Governor promised to submit to the Legislature one or more measures to meet that need. The bill which became the Act herein was submitted by the Governor. (See Exhibit B of defendants' Answers to Interrogatories.) The Governor most probably determined that he could spare \$28,000,000 from his 1970-71 budget for that purpose and directed the Division of the Budget to work out a formula by which that amount could be distributed to the religious schools, and out of their computations came the statutory formula.

The reason the appropriation was made in an "Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination * * *", is, as conceded by defendants-appellants (Brief, p. 16), to be found in the fact that Article XI, Section 3 of the New York State Constitution forbids appropriations in aid of religious schools "other than for examination or inspection."

C. The Application of the Act

1. Eligibility

The defendants-appellants interpret and apply the Act to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach (App. 53a-54a, 88a).

2. Reporting and accounting

The beneficiary schools do not and are not required to submit reports accounting for the moneys received and how they are expended (App. 52a-53a, 87a).

3. Relationship of sums received to actual expenditures for mandated services

The sums granted to a school need bear no relationship to the costs of the mandated services. "As a matter of fact, reimbursement is provided on the basis of a formula which is in itself independent of such costs * * *." (Exhibit G to defendants-appellants' Answers to Interrogatories, p. ES 1.8.) Thus, in a typical case (Catholic Central School) the beneficiary was entitled under the statutory formula to receive the sum of \$77,878 although the actual cost of mandated services was only \$24,674 (*ibid.*, p. ES 1.9); and in another typical case (North Shore Hebrew Academy), the school was entitled to receive \$27 per pupil for a total grant of \$5,400 although the actual per pupil cost of mandated services was \$8.88 for a total of \$1,776. (*Ibid.*, p. ES 1.10.)

4. The relationship of examination costs to other costs

Exhibits D and G, submitted in response to Interrogatory 6 (App. 53a), show that by far the major expense within the contemplation of the Act as interpreted and applied by the defendants-appellants consists of the prorated cost of teachers' services in preparing and administering examinations. Thus, in the case of Catholic Central High School the total costs of all services was \$84,033, of which fully \$68,853 represented the cost of teachers' services in reporting and administering examinations; in the North Shore Hebrew Academy the respective sums were \$8,492 and \$6,716.

Examinations fall into two classes: external examinations formulated outside the church school or the church

school system, such as State Regents, Pupil Evaluation Programs (PEP), intelligence tests, etc.; and internal examinations, i.e., those formulated by the teachers themselves or the Diocesan authorities. The exhibits show clearly and it is conceded by defendants-appellants (Brief pp. 9, 16), that the costs of internal examinations far exceed those of external examinations. Thus, of the \$68,853 attributed to examinations in Catholic Central High School, fully \$65,172 was attributed to teachers' and Diocesan examinations. In the North Shore Hebrew Academy, the total costs attributed to statutory services was \$8,492 of which \$6,716 was attributed to teachers' examinations (Exhibit G, pp. ES 1.8-1.10).

5. Accountability for excess of grant over expenditures

The beneficiary schools are not required to account for or return any excess of sums granted over the amounts actually expended for mandated services, and hence may use such excess for religious worship or sectarian instruction (Exhibit G, p. ES 1.8; App. 87a, 88a).

Summary of Argument

The Act is unconstitutional on its face under the Establishment Clause of the First Amendment for at least three reasons: First, it constitutes governmental financing and subsidizing of schools which are controlled by religious bodies and are organized for and engaged in the practice, propagation and teaching of religion; and it is immaterial that the appropriation purports to be to compensate for services which may or may not be required by law. Second,

it necessarily and inevitably gives rise to excessive governmental involvement in and entanglement with religion. Third, it constitutes governmental action whose primary effect is to advance religion.

The Act as applied is unconstitutional under the Establishment Clause for at least three reasons: First, it allows the moneys granted to be used in whole for religious worship and sectarian instruction. Second, it allows at least the excess of the granted moneys over the costs of the mandated services to be used for religious worship and sectarian instruction. Third, it includes in the concept of statutory services internal (i.e., teacher or Diocesan) examinations which are a form of teaching and may be religious teaching.

ARGUMENT

I

The statute challenged herein is unconstitutional on its face as violative of the Establishment Clause of the First Amendment.

A. The Frame of Reference

The main thrust of the briefs of all appellants is that the underlying legislative purpose is not to aid religion but to further the secular education of pupils in nonpublic schools. Assuming this to be true, the fact remains that the frame of reference in this case, as in all cases of governmental financing of the operations of religious schools, is the First Amendment. This was clearly stated by this Court within the past year in the following words:

Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971). See also *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 1532-33 (1972).

B. Governmental Subsidization of Sectarian Schools

If there is any proposition in constitutional law which may be said to be firmly established it is that under the Establishment Clause government may not make unrestricted grants of public funds to schools organized for or engaged in the practice, propagation and teaching of religion. *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Earley v. DiCenso*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Johnson v. Sanders*, 319 F. Supp. 421 (U.S. D.C. Conn.), affirmed 403 U.S. 955 (1971); *Wolman v. Essex*, 342 F. Supp.

399 (E.D. Ohio), *affirmed* — U.S. —, 93 S. Ct. 61 (1972); *Americans United for Separation of Church and State v. Oakey*, 339 F. Supp. 545 (U.S. D.C., Vt. 1972); *Kosydar v. Wolman*, — F. Supp. — (U.S. D.C., S.D. Ohio, decided December 29, 1972).

The sole basis therefore upon which the appellants contend and can contend for constitutionality in the present case is that the grants are purportedly earmarked to pay for mandated inspection and examination costs. We believe that this reliance is completely unfounded.

It is true, of course, that in *Everson* the Court upheld the constitutionality of a statute appropriating public funds for transportation to religious schools, and in *Allen* it held the same in respect to a statute authorizing the loan of secular textbooks to pupils in such schools. But in *Everson* the Court was careful to point out that the statute there approached "the verge of [constitutional] power" (330 U.S. at 16); and in *Lemon* the Court indicated that it was not prepared to go any further than permitted by these decisions, namely, "[b]us transportation, school lunches, public health services, and secular textbooks supplied in common to all students * * *" (403 U.S. at 616-617).

In *Lemon*, *DiCenso* and *Johnson v. Sanders*, the Court struck down statutes which in different ways sought to appropriate public funds to pay for secular teaching in religious schools. In *Lemon*, the Court pointed out one way in which these statutes differed from those in *Everson* and *Allen*. The Court said:

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to

the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. * * * (403 U.S. at 621)

We do not suggest that this is the only constitutionally relevant distinction between the present case and *Everson* and *Allen*, or that all forms of indirect governmental aid to church-related schools are permissible under the Establishment Clause. We submit only that at the very least *Lemon* holds unconstitutional on its face a law providing direct financial aid to church-related schools, and that the Act herein concededly is such a law.

It is no answer that *Lemon*, *DiCenso* and *Johnson v. Sanders* dealt with teaching services whereas the present statute refers to inspection and examination services. In the first place, examination costs are as much a part of the cost of maintaining and operating a school as are teaching costs. In the second place, as will be discussed more fully later, examinations are an integral part of the teaching process. Finally, nothing in the cited cases indicates that the strictures of the Establishment Clause are limited to teaching expenses; *Tilton v. Richardson*, which allowed construction costs for colleges and then only under severe restrictions not complied with here (see Interrogatory 4 and Answer thereto, App. 52a, 87a) indicates quite clearly that construction costs would not be allowable in cases of elementary and secondary schools.

At the conclusion of his opinion expressing his dissent in *DiCenso* and his concurrence in *Tilton* and partial con-

currence in *Lemon*, Mr. Justice White said (403 U.S. at 671):

As a postscript I should note that the Court decides both the federal and state cases on specified Establishment Clause considerations, without reaching the question that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

This statement applied not only to the *Lemon* and *DiCenso* cases, which concerned teaching in elementary and secondary schools, but no less to *Tilton* which concerned construction grants for facilities used exclusively for secular purposes. In the present case, as we have noted above, the defendants-appellants concede that the Act applies to schools which restrict entry on religious grounds and which require all students to receive instruction in the tenets of a particular faith.

Nor is it any answer that the services for which the grants are purportedly made are required by law; so too were the secular teaching services involved in *Lemon*, *DiCenso*, *Johnson* and *Oakey*, *supra*. Moreover, record keeping and examinations are not the only requirements imposed by law upon nonpublic schools. The schools must be conducted in safe, sanitary, well-lit and well-heated buildings. If the proposition that what is mandated may be paid for were adopted, it would be constitutional for the State to pay for sanitation, repairs, fuel, lighting and a host of other maintenance services in parochial schools. The District

Court for the Southern District of New York unanimously held this not constitutionally permissible (*Committee for Public Education and Religious Liberty v. Nyquist*, decided June 1, 1972); if it were, there would, we submit, be little left of the Establishment Clause.

C. Government Entanglement with Religion

In *Lemon* and *DiCenso*, the Court noted that the challenged statutes provided that none of the funds granted thereunder were to be used for religious worship or sectarian instruction. The Court further noted that these provisions recognized the unchallenged truth that if the statute authorized use of the funds for these purposes it would be patently unconstitutional. But, the Court pointed out, the enforcement of this provision involves the government in the entanglement with religion that it was the purpose of the Establishment Clause to prevent and forbid.

This is exactly the situation in the present case. The Act (Section 8) expressly forbids the use of any of the granted funds for religious worship or instruction. As we have noted in our Statement of the Case and will discuss further hereinafter, this provision is completely disregarded in the application of the Act, but under *Lemon* and *DiCenso* its very presence in the Act renders the statute unconstitutional by inevitably requiring that "comprehensive, discriminating, and continuing state surveillance" which the First Amendment forbids (403 U. S. at 619). The District Court, we submit, was eminently correct in its statement that

[t]he dilemma * * * is insoluble. Either the statute falls because a system of surveillance and control would

create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

D. Purpose and Effect

In *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Court announced what has since become known as the purpose-effect test. The Court there said (at p. 222):

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion.

In *Lemon-DiCenso*, the Court, having determined that the statutes were unconstitutional under the entanglement test, did not find it necessary to consider them under the purpose-effect test. In *DiCenso*, the District Court did address itself to the latter test and held the Rhode Island statute unconstitutional under that test as well as under the entanglement test. Judge Coffin, speaking for the Court, said (316 F. Supp. 112):

The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental." Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance." The problem

of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "the primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (?)] proposed test, sophisticated book-keeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities. * * *

In a footnote, Judge Coffin added:

Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCullum v. Board of Education*, 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense.

* * *

What Judge Coffin said in *DiCenso* is no less applicable here. Examinations are an integral part of teaching and in any event their costs are no less an essential element in the "expenses of a religious institution." A statute which relieves the church of that substantial expense and transfers it to the public treasury cannot but have the effect of advancing religion.

II

The construction and application of the Act by the defendants-appellants renders it unconstitutional as violative of the Establishment Clause of the First Amendment.

A. Use of Statutory Funds Wholly for Religious Worship or Instruction

Section 3(5) of the Act defines a qualifying school as a nonprofit nonpublic school which provides instruction in the twelve common school subjects (arithmetic, reading, spelling, etc.). The defendants-appellants have interpreted this to mean that no other qualifications for participation in the benefits of the Act may be imposed, and have applied it accordingly. Thus, as we have noted in our Statement of the Case, they deem eligible for payments schools which impose religious restrictions on admissions, require attendance of pupils at religious exercises, require obedience by students to the doctrines and dogmas of a particular faith, are an integral part of the religious mission of the church sponsoring them, have as a substantial purpose the inculcation of religious values, impose religious restrictions on faculty appointments, and impose religious restrictions on what or how the faculty may teach.

These indicia of religiosity, which we presented to the defendants-appellants in item 7 of our Interrogatories, were not created by us out of whole cloth. They were culled from the various opinions in *Lemon*, *DiCenso* and *Tilton* and indicate the characteristics of institutions which as least a majority of the Court (and perhaps all) hold constitutionally ineligible to receive governmental grants, whether the institutions operate on the college or on the elementary and secondary level, and whether the grants are used for purposes which are instructional or non-instructional (e.g., construction of facilities). It follows that, whether or not the Act is unconstitutional on its face, there can be little doubt it is unconstitutional as interpreted by the defendants-appellants.

There is, however, another aspect of the defendants-appellants' administration of the Act which is even more flagrantly and unchallengeably violative of the Establishment Clause. As we have shown, the defendants-appellants consider it no concern of theirs as to how the beneficiary schools use the funds granted to them under the Act. The only reports they require of the schools are those showing (a) that the particular school is a qualifying one as defined in the Act, and (b) the number of students in regular attendance so that the proper allocation may be made to it. According to the defendants-appellants' construction and application of the Act, the schools may within the authority of the Act expend every dollar received from the State to pay for the indoctrination of the students in the Torah, catechism or the Thirty-nine Articles of Faith.

In *Tilton*, the Court ruled that public funds could not constitutionally be used to erect facilities in which sectarian

instruction would be conducted even after twenty years. In *Lemon*, it ruled that the funds could not be used to pay the salaries of even those teachers who teach secular subjects exclusively. How, then, can it be assumed that the Establishment Clause permits the state to finance purely religious instruction in nonpublic schools simply because the common branches of secular education are also taught there?

This fatal defect cannot be cured by change of position and procedure on the part of defendants-appellants and by their insistence that hereafter the schools report on the expenditures of the statutory funds received by them. Auditing of these reports on the part of the defendants-appellants would involve the State in exactly that entanglement which *DiCenso* forbids, as is evident from the following statement in the *DiCenso* opinion (403 U.S. at 620-21):

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education exceed the comparable figures for public schools. *In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures are attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.* It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" in *Walz*

v. *Tax Commission, supra*, at 675, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses. (Emphasis added.)

B. Use of Statutory Funds in Part for Religious Worship or Instruction

We concede, of course, that State mandated services, i.e., those "provided for or required by law or regulation," cost money, and therefore it may be presumed that, although not required under the defendants-appellants' interpretation and administration of the Act (Exhibit G, p. ES 1.8), some of the statutory funds are used to pay for mandated services. What may surprise the Court, however, is how small a part of the funds are actually needed to cover the costs of mandated services.

Some six months after this suit was commenced, the New York State Education Department instituted a cost analysis for mandated services in some nonpublic schools. The report of that analysis is marked Exhibit D and was submitted by the defendants-appellants in response to Interrogatory 6 (App. 58a). The conclusion reached in that report, stated on page i thereof, is that "On the basis of the material herein presented, it is evident that the \$28,000,000 apportioned amount specified within Chapter 138 of the Laws of 1970 is justified."

In advance of receiving the answers to the interrogatories we propounded to the defendants-appellants, we informed the District Court that we would accept those answers sight unseen as constituting a stipulation of facts (though, of course, not of conclusions) in this case. Yet we

cannot refrain from expressing some degree of reservation regarding Exhibit D. Included, for example, among costs properly attributed to mandated services are \$10,000 to maintain the Mercy Convent and \$7,000 for Sisters' transportation costs. (Mode I, pp. 16-17.)

But what is even more startling in the cost analysis is the finding that a teacher spends 52.4 instructional days a year in testing, plus another 10 days in what the analysis refers to as "mandated services" ("PEP, Attendance," etc.). (Exhibit D, Mode III, p. 2.) Since the normal school year (upon which Section 2 of the Act bases the formula for grants) is 180 days, this means that more than a third of a teacher's time in school is spent on non-teaching services

The only alternative to this otherwise shocking conclusion is that testing is part of the teaching process. With this we agree and will return to it shortly. Here we note only that apparently the State Board of Regents shared our reservations.

The consultant who estimated that 52.4 days were devoted to testing and 10 days to "mandated services" quite frankly, if perhaps unintentionally, recognized a distinction between internal testing and mandated services. (PEP, as we have noted above, is an external examination.) The Chairman of the Board of Regents apparently wanted more enlightenment on this and requested of the Education Department an analysis which would show how much of testing costs in the cost analysis (Exhibit D) reflected internal examinations and how much external testing. The response to the request is the very revealing Exhibit G to which we have previously referred in this Brief.

Page ES 1.9 of Exhibit D takes as a typical example Catholic Central High School in Lansingburgh. The total testing and examination costs are estimated to be \$68,853. As to this, the report says:

Of the above testing and examination services, only the Regents Scholarship and January and June Examinations might be regarded as *specifically mandated*. Inclusion of such costs only would reduce the examination figure by \$66,629. (Emphasis in original.)

Thus, the cost of specifically mandated testing and examination services is only \$2,224. If we add to this the cost of specifically mandated non-testing services (e.g., attendance costs, pupil health records, etc.), which are set forth as totaling \$15,180, we get the sum of \$17,704 for all specifically mandated services. Even if "Kind and Benefit" and "Indirect Costs" are added, as the report does, the total amounts to only \$24,674. "The apportionment to Catholic Central High School, consistent with Chapter 138," the report stated, "is estimated at \$77,878."

What this revealing report shows is that less than one-third of the State grant for mandated services is used for mandated services. The remainder becomes part of the school's general treasury and is used for its general purposes, including religious worship and instruction.

The figures in respect to North Shore Hebrew Academy of Great Neck (p. ES 1.10), the other typical nonpublic school reported on, show practically identical results. The total amount to which the school is entitled under the Act is \$5,400; the estimated costs of mandated services total \$1,776, again less than a third.

The upshot of all this is that the only way that the nonpublic school costs can be reconciled with the statutory formula is by including within the concept of mandated services those connected with the formulation and administration of internal tests such as teachers' and Diocesan examinations (which, of course, are not "provided for or required by law or regulation").

Before we address ourselves to this point, we add what we believe to be an important and indeed critical observation. Even if it be assumed that (a) the *in litem* cost analyses made by the defendants-appellants are completely valid, (b) all the schools benefiting under the Act would show a similar pattern of expenditures exceeding the statutory grants, and (c) the excess of costs over benefits is true today as when the analyses were made, the fact remains that there is and can be no assurance that this will always be so. Perhaps had this suit not been brought, the analysis would still have been made, but under the defendants-appellants' construction and application of the Act they are not required. Moreover, under their construction even if a future analyses were to show that the benefits exceed the costs, the schools would still be statutorily entitled to the full benefits.

In *Tilton*, the Court held a statute which allowed a building constructed even only partially with governmental funds to be used for sectarian instruction or religious worship after 20 years violated the Establishment Clause. There was no evidence in that case that the buildings would or were intended to be used for those purposes at the expiration of the period. It was sufficient, the Court held,

that under the statute the building *could* be used for those purposes.

This, we suggest, is no less true in the present case. Under the Act as construed by defendants-appellants if at any time, not 20 years hence but even next year or the year thereafter, benefits should exceed costs the excess could be used to finance sectarian instruction or religious worship.

C. Testing as Teaching

It is almost a truism in pedagogy that testing is an instrument of instruction. As one authority put it, "Examinations are part of the ancient heritage of education." Bebell, "The Evaluation We Have," in 1967 *Yearbook of Association for Supervision and Curriculum Development, National Education Association*, p. 30. See also, Tyler, Gagne and Scriven, *Perspectives of Curriculum Evolution*, 5-6 (1967).

Testing is not merely just another instrument but is a particularly effective instrument of instruction, as is evidenced by the fact that, under the name "catechism," it is the traditional method of religious instruction. Every teacher knows that students put most of their effort in studying for examinations, and that the secret of success in taking examinations is giving the teacher what the teacher wants. This is especially true in the area of religion as Thomas Jefferson implied some two hundred years ago. The civil magistrate, he said in the great Virginia Statute for Establishing Religious Freedom, who intrudes his powers into the field of opinion "will make his opinions the

rule of judgment and approve or condemn the sentiments of others only as they shall share or differ from his own" (12 Hening, Virginia Statutes, 85.)

Is it likely that a student in the North Shore Hebrew Academy would give the same answer to a question on the origins of Christianity in a test formulated and graded by his teacher as he would give to the same question if he were a student in Catholic Central High School? Can it be assumed that a student in the latter school would give the same answer to a question on the Reformation as would be given by a student in a Lutheran high school?

It is in this respect, among others, that this case differs from *Everson*. In the former case what was financed was transportation on buses where normally religious instruction does not take place (actually, in that case the transportation was on public buses); if it did, constitutionality could hardly be upheld in view of *Tilton* and *McCollum*. In *Allen*, no funds were given to the schools; what was involved was the lending to parochial school children of publicly owned secular textbooks which were in use in the public schools. In neither case was entangling surveillance necessary to assure nonuse of public funds for sectarian instruction.

A perceptive article by Professor George R. La Noue of Teachers College, "Religious Schools and 'Secular' Subjects," appearing in the Summer 1962 issue of *Harvard Educational Review* (Vol. 32, pp. 272-275, 281), shows how tests in even so value-free a subject as arithmetic can be used for religious indoctrination. The following examples

come from three books published for use in church schools, two Catholic and one Protestant. (The books are: Sister M. Paulita Campbell, *Progress in Arithmetic, Grade 4* (1957); Sister Mary St. William, Sister Mary Emerentia, Sister Mary Florence, et al., *New Way in Numbers* (1961); Sidney Dystra, *Mathematics Curriculum Guide* (1958)):

How much money must I have to buy these four books? *Poems About the Christ Child*, \$1.85; *Story of Our Lady*, \$2.25; *Saint Joseph*, \$1.05; *Saint Theresa*, \$2.00.

The children of St. Francis School ransomed 125 pagan babies last year. This year they hope to increase this number by 20%. If they succeed, how many babies will they ransom this year?

David sells subscriptions to the *Catholic Digest* on a commission basis of 20%. If the subscription is \$2.50 a year, what is David's commission on each sale?

China has a population of approximately 600,000,000. Through the efforts of missionaries 3,000,000 have been converted to Catholicism. What percentage of the people of China have been converted?

In Africa Father Murray, a Holy Ghost father, was given a triangular piece of ground upon which to build his church. What was the area of this ground if it had a base of 80 feet and an altitude of 120 feet?

* * *

Jim made the Way of the Cross. He likes the sixth station very much. What Roman numeral was written above it?

In millions of homes Our Lady's challenge has been accepted, but she wants billions throughout the world to join the Family Rosary for Peace. Do you know how to write in figures large numbers such as those just mentioned?

* * *

Why is it important to learn mathematics? Responses should relate to the idea that mathematics reveals God.

Why should a student's work be neat, accurate, and honest? Responses should relate to the idea that mathematics is a useful tool for work and service and must be done according to God's standards.

What would be the basis on which you would establish a business? Responses should relate to Christian ethics, stewardship, and usefulness.

How are number ideas used in making things? Responses should relate to mathematics as a tool for our creative activity.

How were mathematical ideas used in the creation of the world? Responses should relate to God the Creator and indicate the observation of form and order in creation.

Where does the idea of numbers come from? Responses should relate to God as the source of mathematical principles and of all knowledge.

What part did man play in revealing God through mathematics? Responses should deal with the history of the number system.

Mr. Justice White based his concurrence in *Lemon* on the fact that there the complaint alleged that the challenged statute "finances and participates in the blending of sectarian and secular instruction," and if proved "would establish financing of religious instruction by the State." (403 U.S. at 670-71). Do not these examples clearly show "the blending of sectarian and secular instruction?"

We do not know if these books are still in use in any church schools, or if they are whether any teachers use the suggested tests and the suggested answers. But this we submit is constitutionally irrelevant, as is clear from

the following quotation from the Court's opinion in *Di-Cenzo* (403 U.S. at 618-19):

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

• • •

A comprehensive, discriminating, continuing state surveillance will inevitably be required to insure that these restrictions are obeyed and the First Amendment otherwise respected. • • • These prophylactic contracts will involve excessive and enduring entanglement between church and state.

This is exactly the situation in the present case. Even if it be assumed that a "comprehensive, discriminating, continuing state surveillance" would not be required in respect to external examinations such as those formulated by the State Board of Regents, the administration of these, as we have seen, makes up only a fraction of examination costs. Policing of teacher and Diocesan examinations is

impossible without involving that "excessive and enduring entanglement between church and state" which the First Amendment forbids.

Conclusion

There is no escape from the dilemma and no way in which the Act can be enforced without either subsidizing religious instruction or entangling the State in religion. In either event, the Act is unconstitutional under the Establishment Clause both on its face and as applied, and should be so held by this Court.

Respectfully submitted,

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January 5, 1973

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Interest of Amicus	2
Summary of Argument	3
The Mandated Services Act	4
Argument:	
The Mandated Services Act is Constitutional	6
Even if the Mandated Services Act Were Held to be Unconstitutional as Applied to Religiously Affili- ated Schools, it is Severable and Valid as to Schools Without Religious Affiliations	7
Conclusion	11

Table of Authorities

Cases:

<i>Alpha Portland Cement Company v. Knapp</i> , 230 N.Y. 48 (1920)	8
<i>Meyer v. Wells, Fargo & Company</i> , 223 U.S. 298 (1912)	8
<i>People v. Mancuso</i> , 255 N.Y. 463 (1931)	8
<i>Reitz v. Mealey</i> , 34 F. Supp. 532 (1940)	8
<i>United States v. Jackson</i> , 390 U.S. 570 (1968)	8

Statutes and Regulations:

[1970] Laws of New York ch. 138	2, 4
[1920] Laws of New York ch. 680	10
[1905] Laws of New York ch. 699	10
Regulations of the Commissioner of Education § 176.1	4, 5

Other:

By-Laws, New York State Association of Independent Schools, Art. 1 §§ 2.1, 2.2, 2.6, 2.7	3
Constitution, New York State Association of Inde- pendent Schools, Art. II	3
The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State (1973)	6, 9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and
EWALD B. NYQUIST, as Commissioner of Education of the State
of New York,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

EARL W. BRYDGES, as Majority Leader and President pro tem
of the New York State Senate,

Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

CATHEDRAL ACADEMY *et al.*,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF NEW YORK STATE ASSOCIATION OF
INDEPENDENT SCHOOLS, AMICUS CURIAE**

Preliminary Statement

This brief is submitted, with the consent of all parties,
on behalf of the New York State Association of Independent
Schools ("the Association"), in support of the position

of Appellants who appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 1, 1972, permanently enjoining enforcement of Chapter 138 of the 1970 Laws of New York (hereafter "Mandated Services Act"). The Act provides for a fixed payment, per enrolled student, to be made to each qualifying nonpublic school in connection with its expenses for services consisting of:

"examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Mandated Services Act § 2)

The Court below held that the Act violated the First Amendment of the United States Constitution.

Interest of Amicus

The Association is an educational corporation chartered by the Board of Regents of the University of the State of New York. Its principal stated purposes include the following:

1. " * * * to promote the independence and well-being of, and public regard for, the independent schools of the State of New York;"
2. " * * * to safeguard the interests of these schools in the matter of legislation and regulation;"
3. " * * * to serve as the New York State member association of the National Association of Inde-

pendent Schools"*; (New York State Association of Independent Schools, Constitution, Art. II.)

The Association's membership comprises 98 member schools, all situated in New York State. Their enrollment consists of approximately 31,500 elementary and secondary school students. Requirements for membership in the Association include: (i) "The school shall be incorporated as a non-profit institution." (ii) "Students, otherwise qualified, shall be admitted to the school without regard to race, color, religion, creed or national origin; except that, with regard to religious or denominational institutions, students, otherwise qualified, shall have the equal opportunity to attend therein without discrimination because of race, color or national origin." (iii) Scholastic accreditation. (New York State Association of Independent Schools, By-Laws, Art. 1 §§ 2.1, 2.2, 2.6, 2.7.)

Of the Association's 98 school membership, 82 have no affiliation with any religious organization. The remaining 16 have some affiliation with a religious group, and 10 of these are supported or are under the auspices of such a group.

Summary of Argument

The Mandated Services Act provides for payment of a fee from State funds to nonpublic schools for their extraction of information, required by the State from all schools, both public and nonpublic, to be delivered to the State, in the interest of insuring a sound educational system throughout the State. The Act is not a "law respecting an establishment of religion, or prohibiting the free exercise there-

*The National Association of Independent Schools, Inc. is a Massachusetts corporation which, through its State members, represents more than 750 independent schools throughout the U.S.

of", and, accordingly, does not violate the First Amendment of the United States Constitution.

Even if the Act could properly be held to violate such First Amendment in its application to nonpublic schools affiliated with a religious organization, the Act is severable and must be deemed valid insofar as it provides for payments to nonpublic schools which have no religious affiliation.

The Mandated Services Act

The Act provides that there shall be apportioned annually by the Commissioner of Education, from State funds, for payment to qualifying nonpublic schools 15¢ per school day per student for students in grades one through six; and 25¢ per school day for students in grades seven through twelve (§ 2(a)(b)). For a normal school year the annual payment per pupil would be \$27 for grades one through six, and \$45 for grades seven through twelve.

Qualifications for receipt of the foregoing payments are provided for under Regulations of the Commissioner of Education, Sec. 176.1 paras. "(a)" through "(g)". Paragraph "(a)" thereof specifies that all teachers serving on the staff of such a school shall have certain qualifications, and paragraph "(g)" specifies that the school shall be non-profit. Each of the other qualifying paragraphs, namely, "(b)" through "(f)", requires the extraction and collecting by the school of State specified information and the furnishing of the resulting data to the State, as follows:

- (b) Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the re-

sults of all specific tests or examinations which may be prescribed by the commissioner.

(c) Such school, if it offers instruction at the secondary level (any of the grades seven through twelve) shall *submit annually to the State Education Department*, at such time and in such form as the commissioner may require, a *Secondary School Report* (Private Schools).

(d) Such school shall *submit annually to the State Education Department*, at such time and in such form as the commissioner may require, a *Report of Nonpublic Schools* (Basic Educational Data System).

(e) Such school shall *submit to the State Education Department*, at such times and in such form as the commissioner may require, such additional information as may be specified by the commissioner pursuant to the provisions of Education Law section 215.

(f) Such school shall maintain, in a form and manner specified by the commissioner, a register of the attendance of each pupil enrolled in the school. All such registers shall be retained by the school for a period of not less than fifty years following the close of the school year for which each such register was maintained, and shall be made available for inspection by authorized representatives of the State Education Department upon request. Summaries of such attendance registers *shall be submitted annually to the State Education Department* at such time and in such form as the commissioner shall prescribe. [Appendix to brief for Appellants Cathedral Academy et al. at 6a, 7a. (Emphasis added throughout)]

The relationship which the State payment, made on account of the extracting and delivering of the foregoing data to the State, bears to the cost of educating a child in a nonsectarian, nonpublic school, may be judged from the

following: The average cost of educating a child in such schools was, for the school year 1969-1970, \$1,768 for children in kindergarten through 8th grades, and \$2,234 for those in grades 9 through 12.* Thus, the \$27 per student per annum paid under the Act to a qualifying school for children in kindergarten through 8th grade amounted to approximately 1.52% of the school's annual cost of educating the child, and the \$45 received with respect to students in grades 9 through 12, amounted to approximately 2.01% of the school's cost in educating such a child. But for the lower court's injunction herein, the estimated aggregate payments under the Act to the Association's members would have been \$671,700 for the school year 1971-72.

ARGUMENT

I

The Mandated Services Act is Constitutional.

The Association aligns itself unqualifiedly with the Appellants' contentions on this appeal, and urges that for the reasons set forth in Appellants' briefs, the Mandated Services Act makes valid provision for the specified payments from State funds to the qualifying schools under the Act. These payments are made for the extracting of information which such schools, as well as public schools, must deliver to the State, pursuant to requirements established by the State for the State's benefit in supervising and maintaining a statewide, all inclusive educational system. The Act is, accordingly, valid and enforceable and not in violation of the First Amendment of the United States Constitution.

* The tuition charges paid for attendance at such schools averaged approximately 15% less than these costs. Vol. 1 The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State, at 420 (The Viking Press 1973)

II

Even if the Mandated Services Act were to be held unconstitutional as applied to religiously affiliated schools, it is severable and valid as to schools without religious affiliations.

It is the further position of the Association that if this Court should determine that the Act would violate the First Amendment insofar as it permitted payments to nonpublic schools which were affiliated with religious organizations, the Act is severable as to such schools, and the Act must nevertheless be held valid and enforceable with respect to payments to nonpublic schools which qualify under the Act and which have no religious affiliation. Accordingly, the district court was in error when it enjoined all payments under the Act.

The nonsectarian schools, as to which the statute is clearly constitutional, should not be barred from receiving the funds allocated to them. Indeed, the complaint itself seeks to enjoin payments under the Act only insofar as they go "to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith" (Complaint, paragraph 17(2) in the Appendix, at 15a). Eighty-two of the Association's 98 school membership fall clearly *without* the category to which Appellees' complaint is directed. They therefore had no reason to intervene in this action, did not intervene, and their rights should not be abrogated in this proceeding.

It is well established that the question of the severability of a statute is one which is governed by state law. *Meyer v.*

Wells, Fargo & Company, 223 U. S. 298 (1912). The concept of severability, as it has developed in New York, was set forth in the opinion of then Judge Cardozo of the New York Court of Appeals in *Alpha Portland Cement Company v. Knapp*, 230 N. Y. 48 (1920):

"In this state, we have gone far in subdividing statutes, and sustaining them so far as valid. The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. . . . The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether. (at p. 60).

It has also been recognized that the concept of severability is "especially favored in New York" [*Reitz v. Mealey*, 34 F. Supp. 532, 535 (S.D.N.Y. 1940) (L. Hand, C.J.) aff'd 313 U. S. 542, rehearing granted 313 U. S. 597, aff'd 314 U. S. 542 (1941)], and that the "whole tendency . . . has been to apply the principle of severance with increasing liberality." *People v. Mancuso*, 255 N. Y. 463, 473 (1931).

It is also clear that the absence of a severability clause in the statute itself is not significant. This Court has held that "the ultimate determination of severability will rarely turn on the presence or absence of [a severability] clause." *United States v. Jackson*, 390 U. S. 570, 585 n. 27 (1968).

With both the rule and the tendency toward an increasingly liberal application of that rule in mind, it seems clear that the Mandated Services Act presents a situation in which severance should be used to save that part of the statute which is clearly valid. This is a case where there can be little question that "the legislature, if partial

invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised . . .” (Cardozo J. *supra*)

The Mandated Services Act recites that its purpose is “to assure that [the State’s] precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life” and states that the Act will assist in providing the services necessary to this end.

The stipulation of facts in this case* shows that in 1968 there were two hundred ninety-six nondenominational nonpublic schools in New York State with an enrollment of approximately 50,000 students.** More recent statistics show that 6.5% of the students in nonpublic schools (or about 54,700 students) are in nonsectarian institutions.***

The question is then, would the Legislature have wanted to provide aid for the more than 50,000 pupils who could constitutionally receive the benefit of the payments provided for by the State, if the Legislature had realized that such payments could not be made to the remaining schools. Reason must affirm that the Legislature would certainly elect to aid those schools which it constitutionally could.

Inability to compensate for State mandated services in one area, provides no basis for concluding that the Legislature would not desire to achieve its compensation objective to the extent constitutionally permissible. Obviously the making or non-making of the State payments, would affect the level of tuition which qualified nonpublic schools must charge and, in turn, be a significant determinative factor as to whether students would be able to remain in the

* Appendix at 91a, 92a.

** Financial Support NonPublic Schools New York State, October 1969 at 3. Exhibit I in Supplement to Appendix.

*** Vol. 1 The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State, at 388 (The Viking Press 1973).

nonpublic school system, or must leave it, to be added to, and become a further burden on, the public school system.

An obvious objective of the legislation is to ameliorate the economic difficulties which nonpublic schools face today, and to do this in the interests of both furthering the nonpublic school component in the State's educational framework, and lessening the burden on the public school system which must inevitably result if nonpublic schools close their doors because of economic difficulties. In the terms of either of these objectives, State payments which indirectly benefit more than 50,000 students provide a significant achievement in relation to the legislative objectives manifest in the Mandated Services Act, and an achievement which it is inconceivable the Legislature would have elected to abandon merely because it could not achieve more.

If the Legislature desires to abandon its Mandated Services program because of a partial constitutional curtailment of its total purpose, the Legislature may repeal the Act. But in the absence of repeal, it would be unjustifiable for this Court to strike down so much of an Act as is clearly constitutional and is as clearly achieving the very purposes which the Legislature intended to achieve, simply because all of the benefits contemplated could not be achieved.*

The parties hereto have expressly stipulated that there are 296 nondenominational schools in New York State. We therefore urge that the 296 nondenominational schools with their more than 50,000 pupils be permitted to receive the benefits which the Legislature has provided for them.

* It is significant that the Legislature has in the past, and over an extended period of time, enacted legislation which was expressly limited to benefitting nonsectarian, nonpublic schools. (See (1905) Laws of New York ch. 699; (1920) Laws of New York ch. 680.)

CONCLUSION

For the reasons set forth in the briefs of Appellants, the Mandated Services Act is constitutional in all respects and the judgment of the lower court should be reversed, and the complaint dismissed. If, however, this Court should hold that the statute is unconstitutional as it applies to sectarian schools, the judgment of the District Court should nevertheless be vacated as it applies to nonsectarian schools.

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TABLE OF CONTENTS

PAGE

POINT I—

The Record Establishes that the Mandated Services Act Reimbursement Formulas Are Reasonable and Do Not Result in Any Excessive or Illegal Payments to Nonpublic Schools	2
---	---

POINT II—

State Reimbursement of Costs Incurred in Administering Examinations Does Not Result in an Impermissible Entanglement	9
--	---

Conclusion	11
------------------	----

TABLE OF AUTHORITIES

	PAGE
<i>Cases</i>	
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968)	11
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	9, 10
<i>Lightbody v. Russell</i> , 293 N.Y. 492, 58 N.E.2d 508 (1944)	5
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	11
<i>United States v. American Trucking Associations, Inc.</i> , 310 U.S. 534, rehearing denied, 311 U.S. 724 (1940)	5
<i>Walz v. Tax Commission of the City of New York</i> , 397 U.S. 664 (1970)	9
<i>Statute and Regulation</i>	
N.Y. Educ. Law § 3204	3
Regulations of the Commissioner of Education § 176.1 (b)	3, 4

IN THE
Supreme Court of the United States

October Term, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
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Appellees;

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Appellant,

v.

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v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF for APPELLANTS
CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL
and BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL

POINT I

The Record Establishes that the Mandated Services Act Reimbursement Formulas Are Reasonable and Do Not Result in Any Excessive or Illegal Payments to Non-public Schools

Basic to appellees' case is the argument that the statutory reimbursement of 15 cents per elementary pupil per day of attendance (25 cents for secondary school pupils) is excessive and that nonpublic schools are in fact being substantially overpaid for performing the services mandated by law. Appellees assert that the hypothetical overpayments are—or could be—used for religious purposes. The short answer, however, is that there are and can be no such overpayments. As Judge Palmieri, dissenting below, pointed out:

... The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. 342 F. Supp. at 445; JS Appendix, p. 15a. —

Judge Palmieri's statement is fully supported by the cost studies and findings of the Education Department which form part of defendant Nyquist's Answers to plain-

tiffs' interrogatories.¹ In connection with these cost studies and findings, the parties have stipulated that the answers to interrogatories and exhibits relating thereto "may be taken as accepted facts for the purposes of this case." Appendix, p. 91a.

Appellees' argument rests on false assumptions and overlooks some crucial factors. For example, appellees state at page 21 of their brief that "administration of internal tests" is "not 'provided for or required by law or regulation.'" This statement is wrong. Section 3204(2) of the Education Law, cited in our main brief, requires that the instruction given to a minor "elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." The overwhelming majority of tests given in the public schools are formulated, administered and graded by teachers. It is inconceivable that equivalency could be reliably and validly assessed if teachers in nonpublic schools gave no such tests on a progressive basis. Indeed, the Commissioner of Education has promulgated a specific regulation (§176.1(b)) requiring nonpublic schools to maintain a continuing program of testing. This regulation (nowhere cited by appellees) reads:

Such [nonpublic] school shall conduct in all grades in which instruction is offered a continuing program

¹ The majority opinion below does not take issue with Judge Palmieri's statement. After stating that "[n]o factual disputes exist" [342 F. Supp. at 440; JS Appendix, p. 3a], the majority admits: "... If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. 342 F. Supp. at 441: JS Appendix, p. 5a.

of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition, shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner. Appendix to our main brief, p. 6a (emphasis added).

The Mandated Services Act specifically provides reimbursement for this testing, which is required by both law and regulation. Section 2 of the Act reads, in pertinent part:

There shall be apportioned . . . amounts . . . for expenses . . . in connection with administration, grading and the compiling and reporting of the results of tests and examinations . . .

Appellees argue that this language in the Act does not cover periodic tests and examinations administered by the schools. But the language of the statute is not so limited, and the Education Department has specifically construed "mandated services" to include such periodic examinations. Exhibit F, Supplement to Appendix, for example, is a background informational study on the Mandated Services Act prepared by the Education Department on April 16, 1970, the day that Governor Rockefeller submitted the Act to the Legislature. This study sets forth a description of mandated services. The first three such services listed are:

- 1) PEP testing.
- 2) Regents examinations for those schools offering a Regents diploma, plus equivalent examinations^[2] for such areas in which Regents exams are not offered.

² These examinations are prepared by individual teachers.

3) *Periodic examinations for the evaluation of the progress of students.* (emphasis added)

The contemporaneous construction of the Act by the department charged with the responsibility of setting its machinery in motion is "entitled to great weight". *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 549, rehearing denied, 311 U.S. 724 (1940); *Lightbody v. Russell*, 293 N.Y. 492, 496, 58 N.E.2d 508, 510 (1944).

The Education Department prepared cost analyses after the Act had been in force for several months. Exhibit D, Supplement to Appendix. These analyses contain detailed estimates of the costs incurred by nonpublic schools for mandated services, including periodic examinations. All three "Modes" reach the conclusion that the *direct* expenses³ for mandated services incurred by the schools analyzed exceeded the amounts provided under the Mandated Services Act. Hence, the overall conclusion:

³ Appellees' only "reservation" with respect to the calculations contained in Exhibit D is based upon the fact that "Mode I" analyzes certain "indirect costs", such as a proportionate share of building maintenance and transportation, which could theoretically be added to the "direct costs" incurred by nonpublic schools in performing the mandated services. Exhibit D is careful to point out, however, that whether or not such "indirect costs" or "costs beyond direct costs" are taken into consideration, the *direct* costs alone exceed the payments under the Act.

Not only do appellees attempt to minimize the meaning and use of "indirect costs" in Exhibit D, they also attempt to create the impression at page 19 of their brief that more than a third of a teacher's time "in school" is spent on contracting services. But, in attempting to estimate costs for professional work hours involved in the preparation, administration, correction and recording of tests, "Mode III" specifically warns against misinterpretation of the 52.4 days and 10 days referred to by appellees on the ground that translation of "out-of-school" hours into school days inflates the number of days. See Mode III, p. 3, para. 5, Exhibit D, Supplement to Appendix.

ON THE BASIS OF THE MATERIAL HEREIN PRESENTED, IT IS EVIDENT THAT THE \$28,000,000 APPORTIONED AMOUNT SPECIFIED WITHIN CHAPTER 138 OF THE LAWS OF 1970 IS JUSTIFIED.

IN ADDITION it also appears that nonpublic schools are currently providing considerably more in mandated services than they are receiving in financial aid. Exhibit D, Supplement to Appendix, p. 1 (emphasis in original).

In attempting to support their argument that the sums received by qualifying schools bear no relationship to the costs of mandated services, appellees quote at page 5 of their brief a portion of a sentence from page ES 1.8 of Exhibit G, Supplement to Appendix, which states that "reimbursement [under the Mandated Services Act] is provided on the basis of a formula which is in itself independent of such costs . . ." However, the paragraph from which this excerpt is quoted does not support their argument concerning the alleged lack of a proper relationship between the sums apportioned pursuant to the Mandated Services Act and the sums expended for such services by nonpublic schools. What it says in full is this:

While we commonly refer to the Chapter in terms of mandated services, the above implies that the schools are being reimbursed for examinations and testing regardless of whether or not such examinations and tests are precisely stated requirements of the Regents and the State Education Department. Under such an interpretation, as might be expected, the cost data from different schools vary widely, particularly in terms of the different allocations provided to classroom testing. *The comments and examples provided below, therefore, should not be construed as*

indicating that schools are receiving funds contrary to the law. As a matter of fact, reimbursement is provided on the basis of a formula which is in itself independent of such costs; a formula apparently based on an estimate of what such costs might have been at the time of enactment of the law. (emphasis added)

As for the "Taber report" in Exhibit G, it does not take into consideration costs incurred for the preparation and administration of periodic examinations. The report is therefore only relevant here insofar as the costs of mandated services other than periodic examinations are concerned. It does not reflect any determination by the Education Department that these periodic examinations are not mandated. On the contrary, on page ES 1.10 of Exhibit G, the Education Department representative refers to Exhibit D as follows:

The entire study . . . concluded that, including costs of classroom and school testing as appears consistent with Chapter 138 of the Laws of 1970 as written, the nonpublic school incurred costs for all listed services are estimated to be equal to or to exceed the reimbursement provided in the Chapter. (emphasis added)

In summary, as Judge Palmieri pointed out, the uncontested evidence in this case clearly shows that the formulas adopted by the New York Legislature provide only "fractional reimbursement" of nonpublic schools for the expense of the heavy administrative burdens imposed upon them by state law. Two examples illustrate the soundness of the formulas. Under Mode II in Exhibit D, nonpublic schools were paired with public schools in the same area. Holy Trinity High School in Hicksville actually spent \$232.90 per pupil per annum to perform the services mandated by

state law,⁴ as against a statutory reimbursement of \$45 for the year. It cost Hicksville's public high school, on the other hand, \$361.72 per pupil per annum to perform the same services.⁵ Corpus Christi Elementary School in Mineola spent \$77.56 per pupil per annum on mandated services,⁶ as against reimbursement under the Act of \$27 for the year. The Willis Avenue public elementary school in the same city spent \$474.12 per pupil per annum.⁷ In conclusion, Mode II states:

Without hesitation we can clearly point out that all schools sampled expend substantially more for mandated services than the State formula of reimbursement represents in assistance for the nonpublic schools, i.e., \$27 maximum for an elementary child and \$45 maximum for a secondary child.⁸

⁴ See Mode II, p. 14, Exhibit D, Supplement to Appendix.

⁵ See *id.* at 18.

⁶ See *id.* at 29.

⁷ See *id.* at 32.

⁸ *Id.* at 46.

POINT II

State Reimbursement of Costs Incurred in Administering Examinations Does Not Result in an Impermissible Entanglement

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as in the earlier case of *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), this Court recognized that some entanglement or involvement between church and state is permissible and, indeed, inevitable. Only "excessive involvement" is unconstitutional.

An analysis of the New York educational system applicable to both public and nonpublic schools (described at pages 17-24 of our main brief) shows that the Mandated Services Act does not involve any propensity for entanglement above and beyond the type of extensive visitatorial and other powers which New York has historically exercised over its nonpublic schools. Nevertheless, appellees argue that the Mandated Services Act involves unconstitutional entanglement of government with religion in that "testing is an instrument of instruction"⁹ and this Court held in *Lemon v. Kurtzman* that partial payment by the state of nonpublic schoolteachers' salaries involved unconstitutional *excessive* entanglement.

Within the purview of the Mandated Services Act, however, testing is an instrument of assessment or evaluation for assuring the state that both public and nonpublic schools are maintaining appropriate levels of educational achievement. Section 1 of the Act states, in part, that

⁹ Brief for Appellees, p. 22.

the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

In providing for the maintenance of acceptable levels of achievement, the state's interest is only in the levels themselves and *not* in the methodology through which they are achieved. In other words, the focus of the Mandated Services Act is strictly neutral and nonideological.

By way of comparison, in *Lemon v. Kurtzman*, the ultimate focus of the salary supplement statutes in question (and of this Court) was on the substance of certain secular subjects as taught by lay teachers in parochial schools. It was decided that a "comprehensive, discriminating, continuing state of surveillance"¹⁰ on the part of government would be required to assure that these secular subjects were free of religious overtones. No such surveillance is either necessary or useful with respect to New York's particular interest in continuous testing.

There is nothing in the record in this case which shows that examinations are used for purposes of teaching religion in nonpublic schools, a fact which appellees are forced to concede in their brief. *See* Brief for Appellees, p. 25. Nevertheless, appellees' claim essentially is that education in the nonpublic schools is permeated with religion. But this Court has previously rejected that contention with

¹⁰ 403⁹ U.S. at 619.

respect to these schools in New York State. *See Board of Education v. Allen*, 392 U.S. 236, 248 (1968); *Tilton v. Richardson*, 403 U.S. 672, 681 (1971). Then again, the state's own examinations, all of which are administered by nonpublic schools, are surely neutral and nonideological, to begin with.

Conclusion

The Mandated Services Act is in all respects constitutional, and the judgment appealed from should be reversed with a direction to the District Court to dismiss the complaint.

Dated: February, 1973

Respectfully submitted,

PORTER R. CHANDLER

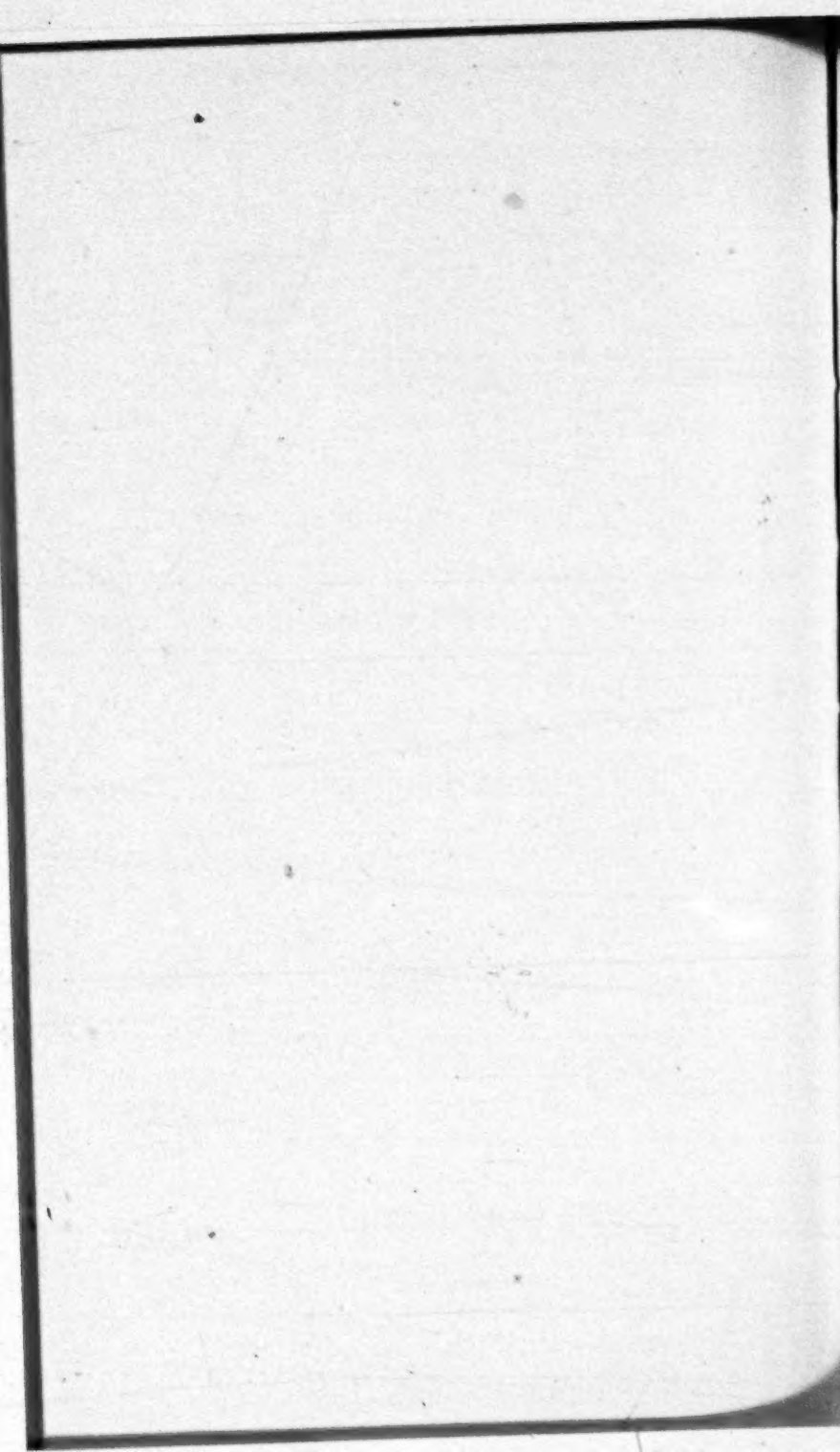
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MICHAEL RODAK, JR.

IN THE

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~~~~~  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**REPLY BRIEF for APPELLANT  
WARREN M. ANDERSON**

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                         | PAGE |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| POINT I—                                                                                                                                                                                                                |      |
| Mandated Services Ad is Not Only Expressly Authorized Under the "Blaine Amendment", the Nature and Spirit of this Aid Has Been the Policy of the State of New York Predating Even the Constitution of this Nation ..... | 2    |
| Conclusion .....                                                                                                                                                                                                        | 7    |

## TABLE OF AUTHORITIES

|                                                                                                                                                                                         | PAGE |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Case</i>                                                                                                                                                                             |      |
| <i>New York Trust Co. v. Eisner</i> , 256 U.S. 345 (1921) .....                                                                                                                         | 3    |
| <i>Walz v. Tax Commission of the City of New York</i> , 397<br>U.S. 664 (1970) .....                                                                                                    | 5, 6 |
| <i>Statutes</i>                                                                                                                                                                         |      |
| N.Y. Constitution, Article XI, Section 3 .....                                                                                                                                          | 2    |
| N.Y. Laws, Ch. 82 (1787) .....                                                                                                                                                          | 4    |
| N.Y. Laws, Ch. 97 (1854) .....                                                                                                                                                          | 5    |
| <i>Miscellaneous</i>                                                                                                                                                                    |      |
| Education in New York State 1784-1954, Compiled and<br>Edited by Harlan Hoyt Horner, the University of the<br>State of New York, the State Education Department,<br>Albany, 1954 .....  | 5    |
| Lincoln, Charles, "The Constitutional History of New<br>York", Vol. III and IV, The Lawyers Co-op, Pub. Co.,<br>Rochester, 1906 .....                                                   | 4, 5 |
| Revised Record of the Constitutional Convention of the<br>State of New York, 1894, Vol. 5, Revised and In-<br>dexed by William H. Stelle, Argus Company Printers,<br>Albany, 1900 ..... | 3    |

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**REPLY BRIEF for APPELLANT  
WARREN M. ANDERSON**

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## POINT I

**Mandated Services Aid is Not Only Expressly Authorized Under the "Blaine Amendment," the Nature and Spirit of this Aid Has Been the Policy of the State of New York Pre-dating Even the Constitution of this Nation**

Basic to Appellee's argument is that the State's program of Mandated Services Aid requires "comprehensive, discriminating, continuing state surveillance," which violates the Establishment Clause of the First Amendment. This position ignores the constitutional and historical basis for such aid.

The so-called "Blaine Amendment," Article XI, section 3, of the New York State Constitution, is often cited as authority for prohibiting the expenditure of public funds in aid of denominational schools. It expressly authorizes such aid, however, . . . "for examination or inspection" . . . of such schools. No better authority can be found for this assertion than the report of the Committee that wrote the "Blaine Amendment" in 1894. On August 23, 1894 Mr. Frederick W. Holls, Chairman of the Committee on Education and the Funds Pertaining Thereto, submitted the Committee's proposal and its report to the Constitutional Convention.

The Report states:

There is one exceptional case provided for in the first sentence of this section in which public money may be used in connection with a sectarian school or institution of learning, and that is contained in the words 'otherwise than for examination or inspection of such institutions.' *This exception, in our opinion, in no way affects the principle, except in so far as it emphasizes even more strongly the interest and latent power of the State with regard to all institutions of learning. Without the words last quoted the question might be raised, whether the section would not prohibit even the trifling expenditure necessary for the inspection and*

examination of denominational schools which are now connected with the University of the State of New York, and this question necessarily raises the broader one, as to whether this connection should be maintained or prohibited as a violation of the principle sought to be established in this article.<sup>1</sup> (emphasis added)

The Committee then goes on to say that the proposed amendment will prohibit the current *per capita* allowance from the State Literature Fund for every student who passed the Regents' examinations.

This, however, by no means necessarily implies that the supervision of the University and the system of regular examinations by which the efficiency of these institutions is tested, must be given up. . . . So far from injuring the educational system of the State, we are of opinion that the latter will be largely benefited by such a course, which extends the uniformity of excellence maintained by State institutions to those under private and sectarian control, and which, by causing the adoption, in many instances, of modern and thoroughly American text-books and methods, necessarily tends to break down the barriers of prejudice by which our people may be divided. *That there may be no question of the authority of the University to continue these examinations, the words last-above quoted have been introduced into this section.* (emphasis added)

The issue of aid to sectarian institutions was probably the most volatile issue at the Constitutional Convention of 1894. Yet in the one hundred and nineteen pages of heated debate the powerful majority, which crushed aid in general to sectarian schools, did not even question the exception for "examination and inspection" because it was so fundamental to this State's public policy.

Mr. Justice Holmes once commented, "A page of history is

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<sup>1</sup> Revised record of the New York State Constitutional Convention, 1894. Document No. 62, pp. 706, 707.

worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The public policy of the State of New York has been and remains that all children of this state, regardless of how or where they are educated, are to receive a standard quality education and this is to be insured by the State. On April 13, 1787, the legislature passed an act creating the Regents of the University of the State of New York.<sup>2</sup> The Act authorized and required the regents "to visit and inspect all the colleges, academies<sup>3</sup> and schools which are or may be established in this State, examine into the status and system of education and discipline therein, and make a yearly report thereof." Charles Z. Lincoln, who wrote a constitutional history of New York State, states in his treatise with regard to this statute, "The meaning of the term 'schools' was originally somewhat uncertain; but in view of the fact that there were then no public schools, it was doubtless intended to include schools other than colleges and academies which might be thereafter established; but by the new legislation,<sup>4</sup> the term has been given an enlarged meaning, and by legislative construction is made to include all schools, public or private, which are subject to state supervision."<sup>5</sup>

The powers of supervision and inspection by the Regents was exercised throughout the nineteenth century and has continued to the present. "In his annual message to the legislature on January 1, 1839, Governor William H. Seward referred

<sup>2</sup> New York Laws, ch. 82 (1787).

<sup>3</sup> Dr. Edward Connors in a dissertation on Church-State relationships in Education in the State of New York published in the Catholic University of America Press, Vol. XVI, No. 2, 1951, pp. 97-103, defined the academy in Nineteenth Century New York. He observed that inasmuch as the public high school did not come into existence in New York until 1850, the academies remained the principal secondary schools throughout the period, being surpassed by the latter only after 1875.

<sup>4</sup> Lincoln's reference to the "new legislation" concerned a 1904 law which created a commissioner of education. New York Laws, ch. 40 (1904).

<sup>5</sup> Lincoln, C., "The Constitutional History of New York", Vol. IV, The Lawyers Co-op Pub. Co., Rochester, 1906, page 717.

to certain laxities in the inspection and supervision both in the common schools and in the colleges and academies . . .".<sup>6</sup>

In 1854, the legislature passed an act creating a state superintendent of public instruction. Among his duties were the visitation and inspection of the "common schools, academies and other literary institutions of the state . . .".<sup>7</sup> Charles Lincoln said of this act:

It will be observed that the act of 1854 required the superintendent to visit the academies and other literary institutions of the state, and to inquire into their course of study, management, and discipline. To this extent the suggestion made in 1835 was adopted in 1854, and the superintendent was given the right of visitation and inspection of all schools. *By this he had the right of visitation of institutions under the general supervision of the regents.*<sup>8</sup> (emphasis added)

The Regents examinations system in New York State began in 1865 with a plan of entrance or "preliminary" examinations for pupils wishing to attend the academies. "These examinations were immediately effective in fostering high standards of instruction and they were extended upward into the regular work of the secondary schools in the form of academic Regents examinations (1878) and downward into the elementary grades in the form of grade examinations (1889)."<sup>9</sup> Harlan Hoyt Horner, former Associate Commissioner for Higher and Professional Education, said that: . . . these examinations have influenced the character of the educational program and have raised the standards of instruction as well as more nearly equalized educational opportunity as between the wealthy and

<sup>6</sup> "Education in New York State 1784-1954", Compiled and Edited by Harlan Hoyt Horner, The University of the State of New York, "The State Education Department", Albany, 1954.

<sup>7</sup> New York Laws, ch. 97 (1854).

<sup>8</sup> Lincoln, Const. Hist. of N.Y., Vol. III, p. 546. The "suggestion made in 1835" was a recommendation of the Assembly Committee on Education for an *ex officio* chancellor of the State University to inspect all schools.

<sup>9</sup> Ed. in N.Y. State, Horner p. 70.

less fortunate school districts, as between urban and rural areas, and as between public and nonpublic high schools.<sup>10</sup>

Mandated Services Aid is merely a continuation of what New York State has been doing for all its youth for nearly two hundred years. In *Walz v. Tax Commission*, 397 U.S. 664 (1970), at pg. 678, Chief Justice Burger noted:

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something lightly to be cast aside.

The legislative purpose of Mandated Services Aid is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. The historical significance of mandated services certainly mutes any charge that it excessively entangles the state with religion.

The examination and inspection by the State of all schools has led to uniform high quality education guaranteed to all citizens of New York. Mandated services should not be lightly cast aside because its demise can only hurt the State's educational program.

The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmental established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.<sup>11</sup>

Mandated services continues the policy of benevolent neutrality begun in 1787 and clearly provided for by the "Blaine Amendment."

<sup>10</sup> Ibid. p. 60.

<sup>11</sup> 397 U.S. 664 (1970), at pg. 669.

### Conclusion

The Mandated Services Act is expressly authorized under the "Blaine Amendment" and is a continuation of the long-standing policy of the State of New York to supervise the instruction of students in all institutions of learning in order to maintain a quality education for all children attending schools in the State. The judgment appealed from should be reversed with a direction to the District Court to dismiss the complaint.

Dated: March 5, 1973

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

#### LEVITT ET AL. v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

No. 72-269. Argued March 19, 1973—Decided June 25, 1973\*

The New York Legislature appropriated \$28,000,000 to reimburse nonpublic schools in the State "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports . . . ." Tests and examinations, the most expensive of these mandated services, are of two kinds: (a) state-prepared tests, such as "Regents examinations" and "Pupil Evaluation Program Tests," and (b) traditional teacher-prepared tests, which constitute the overwhelming majority of tests in nonpublic schools. Qualifying schools receive annually, per pupil, \$27 (grades one through six) and \$45 (grades seven through 12), and are not required to account for the moneys received and how they are spent. While the Act states that it shall not be construed to authorize payments for religious worship or instruction, church-sponsored schools are eligible to receive payments thereunder. The three-judge District Court found the Act unconstitutional under the Establishment Clause and permanently enjoined its enforcement. The court rejected appellants' argument that payments are made only for "secular, neutral, or non-ideological" services. The court held that the greatest portion

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\*Together with No. 72-270, *Anderson v. Committee for Public Education & Religious Liberty et al.*, and No. 72-271, *Cathedral Academy et al. v. Committee for Public Education & Religious Liberty et al.*, also on appeal from the same court.

Syllabus

of the funds is paid for the services of teachers in testing students and that testing is an integral part of the teaching process. The court dismissed as "fanciful" the contention that a State may reimburse church-related schools for costs incurred in performing any service "mandated" by state law. *Held*:

1. The statute constitutes an impermissible aid to religion contravening the Establishment Clause, since no attempt is made and no means are available to assure that internally prepared tests, which are "an integral part of the teaching process," are free of religious instruction and avoid inculcating students in the religious precepts of the sponsoring church. *Committee for Public Education v. Nyquist, ante*, p. —. Pp. 6-9.

2. The inquiry is not whether the State should be permitted to pay for any "mandated" activity, but whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution. P. 9.

3. The Act provides only for a single per-pupil allotment for a variety of services, some secular and some potentially religious, and the courts cannot properly reduce that allotment to correspond to the actual costs of performing reimbursable secular services, as that is a legislative and not a judicial function. Pp. 9-10.

342 F. Supp. 439, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, BRENNAN, and MARSHALL, JJ., filed a separate statement. WHITE, J., dissented.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

Nos. 72-269, 72-270, AND 72-271

Arthur Levitt, as Comptroller of the  
State of New York, and Ewald B.  
Nyquist, as Commissioner of  
Education of the State of  
New York, Appellants,

72-269

v.

Committee for Public Education  
and Religious Liberty et al.

Warren M. Anderson, as Majority  
Leader and President pro tem  
of New York State Senate,  
Appellant,

72-270

v.

Committee for Public Education  
and Religious Liberty et al.

Cathedral Academy et al.,  
Appellants,

72-271

v.

Committee for Public Education  
and Religious Liberty et al.

On Appeals from  
the United States  
District Court  
for the Southern  
District of New  
York.

[June 25, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In this case we are asked to decide whether Chapter 138 of New York State's Laws of 1970, under which the State reimburses private schools throughout the State for certain costs of testing and recordkeeping, violates the Establishment Clause of the First Amendment. A

## 2 LEVITT v. COMMITTEE FOR PUBLIC EDUCATION

three-judge district court, with one judge dissenting, held the Act unconstitutional. *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439 (SDNY 1972). We noted probable jurisdiction. 409 U. S. 977.

### I

In April 1970, the New York Legislature appropriated \$28,000,000 for the purpose of reimbursing nonpublic schools throughout the State:

"... for expenses of services for examination and inspection in connection with administration grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation."<sup>1</sup>  
New York Laws, 1970, c. 138, § 2.

As indicated by the portion of the statute quoted above, the State has in essence sought to reimburse private schools for performing various "services" which the state "mandates." Of these mandated services, by far the most expensive for nonpublic schools is the "administration, grading and the compiling and reporting of the results of tests and examinations." Such "tests and examinations" appear to be of two kinds: (a) state-prepared examinations, such as the "Regents examinations" and the "Pupil Evaluation Program Tests,"<sup>2</sup> and (b) traditional teacher-prepared tests, which are drafted

<sup>1</sup> N. Y. Education Law § 305 charges the Commissioners of Education with the duty of maintaining general supervision over all schools throughout the State and with making sure that each school is "examined and inspected."

<sup>2</sup> The Regents' examinations are described by appellants Levitt

by the nonpublic school teachers for the purpose of measuring the pupils' progress in subjects required to be taught under state law.<sup>3</sup> The overwhelming majority of testing in nonpublic, as well as public, schools is of the latter variety.

Church-sponsored as well as secular nonpublic schools are eligible to receive payments under the Act. The District Court made findings that the Commissioner of Education had "construed and applied" the Act "to in-

and Nyquist as "state-wide tests of subject matter achievement." The pupil evaluation program tests, the so-called "PEP Tests," are also administered throughout the State in grades three, six, and nine.

<sup>3</sup> The District Court indicated that there was some doubt as to whether teacher-prepared tests are within the scope of the Act. The uncertainty was due to one of appellant Nyquist's answers to plaintiffs' interrogatories, which stated that "only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated*." 341 F. Supp., at 411 (emphasis in original interrogatory). The District Court, however, found it unnecessary to resolve this factual ambiguity, stating: "While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or, indeed, whether they can be regarded as specifically 'mandated.'" 342 F. Supp., at 439.

In this Court, appellants have insisted that since teacher-prepared examinations are required by state regulation they are included within the services reimbursed under the Act. In support of the former proposition, the appellants cite § 176.1 [b] of the Regulations of the Commissioner of Education, which provides that all nonpublic schools:

"shall conduct in all grades in which instruction is offered a continuing program of individual public testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner." 8 N. Y. C. R. R. 176.1 [b].

Appellees do not contest the validity of appellants' construction of the Act, and we accept it for the purposes of this case.

clude as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." 342 F. Supp., at 440-441.

A school seeking aid under the Act is required to submit an application to the Commission of Education, who may direct the applicant to file "such additional reports" as he deems necessary to make a determination of eligibility. New York Laws, 1970, c. 138, § 4. Qualifying schools receive an annual payment of \$27 for each pupil in average daily attendance in grades one through six and \$45 for each pupil in average daily attendance in grades one through 12.<sup>4</sup> Payments are made in two installments: Between January 15 and March 15 of the school year, one-half of the "estimated total apportionment" is paid directly to the school; the balance is paid between April 15 and June 15. The Commissioner

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<sup>4</sup> Exactly how the \$27 and \$45 figures were arrived at is somewhat unclear. Appellant Nyquist, in his answer to plaintiffs' interrogatories in the court below, gave the following explanation:

"That prior to the enactment of Chapter 138 of the Laws of 1970, a conference was held in which representatives of the Office of the Counsel to the Governor, of the Division of the Budget in the Executive Department and of the State Education Department participated; that at said conference the representatives of the State Education Department were asked whether the dollar amount in question was reasonable and that the answer was that to the best of their judgment the amount was reasonable; that no record of the said conference was made."

is empowered to make "later payments for the purpose of adjusting and correcting apportionments." New York Laws, 1970, c. 138, § 5.

Section 8 of the Act states: "Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction." However, the Act contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses.<sup>5</sup> In appellant Nyquist's answers to plaintiffs' interrogatories, which the parties stipulated could be "taken as accepted facts for the purposes of this case," the Commissioner stated that "qualifying schools are not required to submit reports accounting for the moneys received and how they are expended."

## II

Appellees are New York taxpayers and an unincorporated association. They filed this suit in the United States District Court claiming that Chapter 138 abridges

<sup>5</sup> Subsequent to the enactment of Chapter 138, the state conducted several studies to determine whether the per-pupil allotment under the statute exceeded the actual costs to schools in performing the mandated services. The District Court found the results "cloudy":

"If such items as 'teacher examinations' and 'entrance examinations' are included in the list of 'mandated services,' it appears that the schools' expenses are at least as great as the amount they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses." 342 F. Supp., at 441.

As noted above, the court did not resolve the question whether payments under the Act were intended to compensate schools for internal testing. See n. 3, *ante*.

the Establishment Clause of the First Amendment. An injunction was sought enjoining appellants Levitt and Nyquist, the State Comptroller and Commissioner of Education, from enforcing the Act. State Senator Earl W. Brydges and certain Catholic and Jewish parochial schools qualified to receive aid under the Act were permitted to intervene as parties defendant.

A three-judge district court was convened pursuant to 28 U. S. C. §§ 2281, 2284. After a hearing on the merits, a majority of the District Court permanently enjoined appellants from enforcement of the Act. The District Court concluded that this case was controlled by our decision in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U. S. 602 (1971), and held the Act unconstitutional under the Establishment Clause.

In reaching its decision, the District Court rejected appellants' argument that the Act is constitutional because payments are made only for services that are "secular, neutral, or non-ideological" in character. *Lemon v. Kurtzman*, *supra*, at 616. The court stated:

"By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process." 342 F. Supp., at 444.

Likewise, the court dismissed as "fanciful" the contention that a State may reimburse church-related schools for costs incurred in performing any service "mandated" by state law.

### III

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U. S. — (1973), the Court has today struck down a provision of New York law authorizing "direct money grants from the State to 'qualifying' non-public schools to be used for the 'maintenance and repair . . . of school facilities and equipment to ensure

the health, welfare and safety of enrolled pupils.' " *Ante*, at 5 (footnote omitted).<sup>6</sup> The infirmity of the statute in *Nyquist* lay in its undifferentiated treatment of the maintenance and repair of facilities devoted to religious and secular functions of recipient, sectarian schools. Since "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes," the Court held that the statute has the primary effect of advancing religion and is, therefore, violative of the Establishment Clause. *Ante*, at 16.

The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in *Nyquist*.<sup>7</sup> As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various "services." Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of testing in the total teaching process, no attempt is made under the statute, and no means are available, to

<sup>6</sup> The Court's holding as to grants of public funds for "maintenance and repair . . . of school facilities and equipment . . ." is sufficient authority to support affirmance of the District Court holding in this case; I joined that part of the Court's holding in *Nyquist, supra*, while dissenting from the holding that tuition grants and tax credits to parents are unconstitutional. I am, of course, bound by all parts of the judgment.

<sup>7</sup> We do not doubt that the New York Legislature had a "secular legislative purpose" in enacting Chapter 138. See *Epperson v. Arkansas*, 393 U. S. 97 (1968). The first section of the Act provides that the State has a "primary responsibility" to assure that its youth receive an adequate education; that the State has the "duty and authority" to examine and inspect all schools within its borders to make sure that adequate educational opportunities are being provided; and that the State has a legitimate interest in assisting those schools insofar as they aid the State in fulfilling its responsibility.

assure that internally prepared tests are free of religious instruction.

We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not "assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment." *Lemon v. Kurtzman*, *supra*, 403 U. S., at 618. But the potential for conflict "inheres in the situation," and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *Lemon v. Kurtzman*, *supra*, 403 U. S., at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.

In the District Court and in this Court appellants insisted that payments under Chapter 138 do not aid the religious mission of church-related schools but merely provide partial reimbursement for totally nonsectarian activities performed at the behest of the State. Appellants, in other words, contend that this case is controlled by our decisions in *Everson v. Board of Education*, 330 U. S. 1 (1947), and *Board of Education v. Allen*, 392 U. S. 236 (1968). In *Everson* we held that New Jersey could reimburse parents of parochial school children for expenses incurred in transporting the children on buses to their schools. And in *Allen* we upheld a New York statute requiring local school boards to lend secular textbooks "to all children residing in such district who are enrolled in grades seven to twelve of a public or private

school which complies with the compulsory education law." *Board of Education v. Allen, supra*, at 239.

In this case, however, we are faced with state-supported activities of a substantially different character from bus rides or state-provided textbooks. Routine teacher-prepared tests, as noted by the District Court, are "an integral part of the teaching process." 342 F. Supp., at 444. And, "[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." *Lemon v. Kurtzman, supra*, 403 U. S., at 617.

To the extent that appellants argue that the State should be permitted to pay for any activity "mandated" by state law or regulation, we must reject the contention. State or local law might, for example, "mandate" minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for those facilities in church-sponsored schools. The essential inquiry in each case, as expressed in our prior decisions, is whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution. *Committee for Public Education and Religious Liberty v. Nyquist, supra*, at 14-15; *Lemon v. Kurtzman, supra*, at 612-613. That inquiry would be irreversibly frustrated if the Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do.

We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount

10 LEVITT v. COMMITTEE FOR PUBLIC EDUCATION

corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function.

Accordingly, the judgment of the District Court is affirmed.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the view that affirmance is compelled by our decision today in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U. S. — (1973), and *Sloan v. Lemon*, 413 U. S. — (1973).

MR. JUSTICE WHITE dissents.